# A TREATISE

ON THE

# LAW OF JUDGMENTS.

INCLUDING ALL FINAL DETERMINATIONS OF THE RIGHTS
OF PARTIES IN ACTIONS OR PROCEEDINGS
AT LAW OR IN EQUITY.

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FOURTH EDITION, REVISED AND GREATLY ENLARGED.

IN TWO VOLUMES.

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# PREFACE.

THE author of this book believes that its publication is amply justified by the importance of the subject of which it treats, by the frequency with which a correct understanding of that subject is essential to a proper and consistent administration of the law, and by the absence of any other work which even professes to treat of the matters considered in this.

A judgment is not invariably "the *end* of the law." Perhaps nothing so fairly demonstrates the persistence of litigants as their constant efforts to escape the consequences of prior defeats. Scarcely a term passes in any of the courts of last resort, in this country or in England, in which it does not become necessary to determine the effect of some prior adjudication An examination of the reports will convince any one that there are but few branches of the law which had been more frequently before the courts than the Law of Judgments.

Whoever, for the first time, gives his special attention to this branch of the law will be less surprised at the *number* of the decisions than at the assurance with which the most *irreconcilable* conclusions have been announced. Cases have frequently been disposed of in accordance with principles which the court evidently regarded as indisputable, but which, in fact, were in direct conflict with the law as understood in most of the other states. Nor can this be deemed remarkable, when we remember that no attempt had been made to collate the various decisions constituting the Law of Judgments.

This work, though not formally subdivided in that manner, consists of seven parts: Part first, including chapters one to seven, shows of what the Record or Judgment Roll is composed, and states the various classifications and definitions of Judgments and Decrees, and the rules applicable to Entries

and Amendments, and to the Vacation of Judgments at Common Law and under the Code. Part second, consisting of the eighth chapter, is devoted to the law in regard to Jurisdictional Inquiries in collateral proceedings. The ninth and tenth chapters constitute the third part, and are designed to show *what persons* are bound by the judgment, by reason of their privity with the parties, or their interest in the subject of litigation, or through the operation of the law of *lis pendens*. Part fourth treats of the important incidents attending judgments, viz.: Merger, Estoppel, and Lien; of the assignable qualities of judgments, and of their admissibility as evidence. Part fifth considers proceedings to revive judgments *scire facias*, and to enforce them as causes of action or defense, with the rules of pleading applicable to those proceedings. The sixth part contains the chapters on Relief, Reversal, and Satisfaction; showing for what causes a judgment may be avoided in equity, what are the effects of its reversal by some appellate tribunal, and what are the means and circumstances which produce its satisfaction. The seventh and last part treats of the different kinds of judgments, and the rules peculiar to each.

In the hope that, at least by its arrangement and citation of authorities, it may aid in the proper determination of cases yet to arise, and may, by producing a more thorough knowledge of the law, assist in the prevention of needless litigation, this work is respectfully submitted to the members of that profession for whose benefit it was prepared.

Sacramento, Cal., January, 1873.

## PREFACE TO SECOND EDITION.

The author has endeavored to merit the kindness with which the first edition of this work was received, by making the second as complete as possible. To accomplish this result, he has consulted a large number of authorities, and has made considerable additions to the text. Particular pains has been taken to embody in this edition the substance of the decisions published since the completion of the work as it was first given to the world. The prior decisions have also received attention, and have repaid it by contributing materially to the increase both of the text and of the table of cases. The Canadian reports, which, until recently, were not within the author's reach, have also been examined, and have been cited as freely as those of the other American courts. From these various sources the number of the citations has been augmented nearly twenty-five per cent, and it is hoped and believed that the value of the work has been increased in a like ratio.

Sacramento, Cal., August 1, 1874.

# PREFACE TO THIRD EDITION.

THE lapse of nearly seven years since the publication of the second edition of this work renders necessary another edition, in order that it may not be left too far behind the most advanced stage of the law. The author has felt a desire to amplify and reconstruct his former work; but the press of other engagements has made this impossible except to a very limited extent. He has, however, added some twelve hundred cases to the authorities cited, and has increased the text about one sixth; and in so doing, has treated some topics not considered in the former editions. Among these topics are, what are final judgments in criminal prosecutions and in intervention cases; the form of judgments with respect to designating the parties and the relief granted; fraud and perjury as grounds for vacating judgments on motion; merger arising from prosecutions and convictions in criminal cases; set-off of one judgment against another; and an entire chapter on the conclusiveness of judgments when questioned on *habeas corpus*. He has also given due prominence to the recent decisions of the Supreme Court of the United States, by which judgments, whether foreign or domestic, seem to remain ever open to collateral attack on jurisdictional grounds.

SACRAMENTO, CAL., June 1, 1881.

# PREFACE TO FOURTH EDITION.

When the preparation of this edition was commenced, and for some months afterwards, the author hoped and expected that its contents, though noticeably greater than those of the previous edition, might still be kept within the limits of a single volume. That they might be so kept, he generally refrained from making extracts from the opinions of the judges, and from citing cumulative authorities upon questions now substantially beyond controversy. Nevertheless, the work grew until its citations doubled in number those to be found in the preceding edition, and its size increased in nearly the same proportion. This increase is distributed so uniformly, that it is difficult to specify the portions of the work which have required and received special consideration. Probably, however, the question of jurisdiction has here, as elsewhere, been the one demanding the most serious attention; and the author has noticed with gratification that the result of the deliberation of the courts of last resort during the past decade has been to strengthen the presumptions in favor of the jurisdiction of courts of record, and to show that, notwithstanding the decision of the Supreme Court of the United States in *Pennoyer* v. *Neff*, the courts of each State have power to enforce obligations entered into by non-residents, to foreclose liens upon their property, to make partition of land of which they are tenants in common, and to determine, at the instance of citizens of the state, adverse claims made by such non-residents to real property situate within the territorial jurisdiction of the court. Special attention has also been given to the orders and proceedings of courts having jurisdiction of the estates of decedents, and to partitions of real property made in the exercise of such jurisdiction, and to judgments of acquittal or conviction

in criminal prosecutions, as well as to the effect, as against citizens of a municipal corporation, of judgments against it in actions wherein it is the representative of public rights and interests.

Realizing that those portions of a text-book which are not adequately indexed remain substantially unpublished, a new and copious index has been prepared, in which the subdivisions of each topic are alphabetically arranged.

San Francisco, February, 1892.

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# LAW OF JUDGMENTS.

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## Part I. — Definitions and Classifications.

§ 1. **Lord Coke's Definition.** — One who sought to dignify everything connected with the common law characterized judgments as "the very voyce of law and right."[1] This language, however distant from the truth in individual cases, is, when applied to the aggregate, but a slight exaggeration. A judgment is the end of the law.[2] It finally terminates the disputes and adjusts the adverse interests of mankind. That it may in truth be the "voyce of right," legislators strive to make the law more in unison with the dictates of justice; judges distinguished for learning, probity, and wisdom are called to the bench; and the principles educed from successive ages of legal altercation are carefully treasured for the benefit of the present and of the coming generations. Every judgment directly enforces some right or suppresses some wrong, thereby producing the end sought by every humanely conceived law. Its incidental results, extending far beyond the time at which it is pronounced, and the parties whose rights it determines, attach themselves to property or to privies in blood or in estate, and continue in binding force and obligation for indefinite periods of time.

§ 2. **Common-law Definition.** — A judgment, except where the signification of the word has been changed by statute, is defined as being "the decision or sentence of the law pronounced by a court or other competent tribunal upon the matter contained in the record";[3] or as "the

[1] Co. Litt. 39 a.

[2] Blystone *v.* Blystone, 51 Pa. St. 373.

[3] Jacob's Law Dict.; 3 Bla. Com. 395; Ætna Ins. Co. *v.* Swift, 12 Minn. 437. It will be observed from the above definition that a judgment may be pronounced by "other competent tribunals" as well as by courts. Many of such tribunals are enumerated in section 531.

conclusion of the law upon facts found" by the court or the jury, "or admitted by the parties";[1] "the conclusion of law in a particular case announced by the court";[2] "the final consideration and determination of a court of competent jurisdiction upon the matters submitted to it";[3] "the determination of the law as the result of proceedings instituted in a court of justice."[4] In some instances, courts have employed language indicating that an adjudication, though final, is not a judgment, if the court in making it acted "in a summary way, and upon a matter addressed to their discretionary jurisdiction."[5] We apprehend, however, that the idea intended to be expressed was, not that such adjudication is not a judgment, but that because it results from the exercise of a "discretionary jurisdiction," appellate courts will not undertake to review it. The language of a judgment is, not that it is decreed or resolved, but that it is considered that the plaintiff recover, or that the defendant go without day. The reasons announced by the court to sustain its decision[6] and the award of execution to produce satisfaction constitute no part of the judgment. "At law, the judgment is yea or nay, for one party and against the other; and recognizes no liens, awards no execution, against specific property, unless when the proceeding is *in rem;* but simply contains the conclusion of "the law upon the facts proved, and leaves the party to his legal and appropriate writ to enforce it."[7]

§ 3. **Means of Enforcing.** — The law provides the means of enforcing judgments. No court has authority

[1] Tidd's Practice, 930; Truett *v.* Legg, 32 Md. 147.

[2] Little Pittsburg Consolidated Mining Co. *v.* Little Chief Consolidated Mining Co., 11 Col. 223; 7 Am. St. Rep. 226.

[3] Whitwell *v.* Emory, 3 Mich. 84; 59 Am. Dec. 220.

[4] Mahoning Bank's Appeal, 32 Pa. St. 100.

[5] Claggett *v.* Simes, 25 N. H. 402; Craddock *v.* Croghan, 1 Sneed (Ky.) 100.

[6] Burk *v.* Table Mountain Co., 12 Cal. 408; Davidson *v.* Carroll, 23 La. Ann. 108.

[7] Kramer *v.* Rebman, 9 Iowa, 114. A judgment should be a simple sentence of the law, upon the ultimate facts admitted by the pleadings or found by the court: Gregory *v.* Nelson, 41 Cal. 278.

to assume legislative powers by providing other means. Decisions made in some of the states proceed upon the theory that if any court, acting solely under authority conferred by the common law, should add to its judgment an order requiring satisfaction to be made in any other way or by any other means than those provided by law, as by requiring payment to be made in a particular kind of money, the appellate court would strike such order out.[1] A different conclusion has, however, been sustained by the highest tribunals of several other states; and there is now a decided preponderance of the authorities affirming the existence of the power to enter judgment for coined dollars, and to enforce it by an execution payable in the same kind of money.[2]

§ 4. **Is a Judgment a Contract?** — That a judgment is a contract, or in the nature of a contract, has been affirmed[3] and denied[4] with equal confidence. On one hand, it is urged as conclusive that each judgment creates an obligation capable of being enforced by an action of debt

[1] Reed *v.* Eldredge, 27 Cal. 348; Whitstone *v.* Colley, 36 Ill. 328; Burling *v.* Goodman, 1 Nev. 314; Olanyer *v.* Blanchard, 18 La. Ann. 616; Buchegger *v.* Schultz, 13 Mich. 420.

[2] Bronson *v.* Rodes, 7 Wall. 229; Emery *v.* Langley, 1 Idaho, N. S., 694; Chesapeake *v.* Swain, 29 Md. 483, 506; Paddock *v.* Com. Ins. Co., 104 Mass. 521; Cheang Kee *v.* United States, 3 Wall. 320; Butler *v.* Horwitz, 7 Wall. 258; Ind. Ins. Co. *v.* Thomas, 104 Mass. 192; Kellogg *v.* Sweeney, 46 N. Y. 291; 17 Am. Rep. 333; Hittson *v.* Davenport, 4 Col. 169; Trebilcock *v.* Wilson, 12 Wall. 687; Dewing *v.* Sears, 11 Wall. 379.

[3] Morse *v.* Toppan, 3 Gray, 411; Sawyer *v.* Vilas, 19 Vt. 43; Taylor *v.* Root, 4 Keyes, 344; Farmers' & M. Bank *v.* Mather, 30 Iowa, 283; Stuart *v.* Landers, 16 Cal. 372; 76 Am. Dec. 538; McGuire *v.* Gallagher, 2 Sand. 402.

[4] Sprott *v.* Reid, 3 Iowa, 489; 56 Am. Dec. 549; O'Brien *v.* Young, 98 N. Y. 428; 47 Am. Rep. 64; Biddeson *v.* Whytel, 3 Burr. 1545; Chase *v.* Curtis, 113 U. S. 452; Rae *v.* Hulbert, 17 Ill. 572; Todd *v.* Crumb, 5 McLean, 172; Wyman *v.* Mitchell, 1 Cow. 321; Smith *v.* Harrison, 33 Ala. 706; Keith *v.* Estill, 9 Port. 669; Masterson *v.* Gibson, 56 Ala. 56; Larrabee *v.* Baldwin, 35 Cal. 156. This last case applies to "contracts" as term is used in act fixing liability of stockholders of corporations. "A judgment is not in itself a contract": In re Kennedy, 2 S. C. 226. "Strictly speaking, a judgment is a contract, and of that class of contracts called specialties; but the word contract is not ordinarily used in a sense that includes judgments; nor is it generally so used by law-writers, nor is it so used in section 20 of the Code of Civil Procedure": Burnes *v.* Simpson, 9 Kan. 658; 12 Am. Law Reg. 59. A judgment is not a specialty as that term is used in the statute of limitations: Tyler's Ex'rs *v.* Winslow, 15 Ohio St. 364.

or *assumpsit*, according to the nature of the judgment; that this obligation is based upon an implied promise entered into by every member of society that he will pay all judgments which may be rendered against him, in consideration that the courts will assist him in preserving and regaining his rights. On the other hand, it is said, with equal truth, that every man who commits a tort impliedly agrees, in consideration of the harm done by him, and the injury occasioned by his misconduct, to pay all damages which his wrong produces; and that the same implied premises necessary to prove that a judgment is a contract may be used with equal justness and efficiency to establish the same thing of every conceivable cause of action. All authorities assert that the existence of parties legally capable of contracting is essential to every contract. But a decided preponderance of authority recognizes judgments entered against lunatics and others incapable in law of contracting as conclusively binding until vacated or reversed. It seems, then, that in order to prove that a judgment is in the nature of a contract, we must supply two of the three essentials of each contract by implication, and the third by some means not yet discovered. The question whether or not a judgment is a contract is sometimes of great practical importance, and may be decisive of the case before the court. Thus a statute may have been enacted seeking to impair the effect of a judgment, and which, if the judgment is a contract, will be inoperative because prohibited by the clause in the constitution of the United States forbidding the enactment by any of the states of laws impairing the obligation of contracts. If the judgment in question was based upon a contract, it must, necessarily, be protected from the statute, because it is but a means of enforcing such contract, and its obligation cannot be destroyed or impaired without impairing or destroying the obligation of the contract. Hence if a cause of action is of such a nature that the legislature could not have discharged or impaired it before

judgment, it is equally protected after judgment.[1] Therefore statutes of a state granting discharges to insolvent debtors cannot affect judgments entered against them in another state upon causes of action which were within the protection of the constitution of the United States.[2] If, however, a judgment is founded upon a tort, or upon any other cause of action not entitled to protection as a contract, such cause of action is not by the judgment transmuted into a contract, and the judgment may therefore be impaired without violating the obligation of a contract.[3]

Though it be conceded that a judgment is not a contract, yet perhaps courts are justified, in some cases, in treating it as though it were a contract, or, rather, in determining that the word "contract," as used in some statute, was intended to include judgments. Thus it has been held that a code provision authorizing the union in one complaint of several causes of action, when they all arise out of contracts, expressed or implied, warranted the joinder of two or more judgments as causes of action;[4] that a statute investing justices of the peace with jurisdiction over actions upon contracts for the recovery of money gave them authority to hear and determine actions upon judgments;[5] that where a statute classifies actions as being *ex contractu* or *ex delicto*, judgments must be treated as falling within the former class,[6] and therefore that their owners are entitled to the same remedies for their collection as if they were contracts, including the right to the issuing of writs of attachment.[7] On the other hand, in several of the states, their courts have declined to give a signification to the word "contract," as used in their

[1] Scarborough *v.* Dugan, 10 Cal. 305; Weaver *v.* Lapsley, 43 Ala. 224.

[2] Bean *v.* Laryea, 81 Cal. 152.

[3] Garrison *v.* City of New York, 21 Wall. 196; McAfee *v.* Covington, 71 Ga. 272; 51 Am. Rep. 263; Freeland *v.* Williams, 131 U. S. 405; Sprott *v.* Reid, 3 Iowa, 489; 56 Am. Dec. 549; Louisiana *v.* Mayor of New Orleans, 109 U. S. 285; State *v.* New Orleans, 32 La. Ann. 709.

[4] Childs *v.* Harris M. Co., 68 Wis. 231.

[5] Stuart *v.* Landers, 16 Cal. 372; 76 Am. Dec. 538.

[6] Moore *v.* Nowell, 94 N. C. 265; Johnson *v.* Butler, 2 Iowa, 545.

[7] Gutta Percha & R. M. Co. *v.* Houston, 108 N. Y. 276; 2 Am. St. Rep. 412.

statutes, different from that to which it is entitled by the weight of authority, and have therefore decided that a statute providing that a promise in writing, or an actual payment, shall be received as evidence of a new and continuing contract to repeal the statute of limitations does not apply to judgments;[1] that a statute of limitations prescribing the time within which actions may be brought upon any loan or contract does not control actions on judgments;[2] that an assignee of a judgment is not entitled to bring suit thereon in his own name under a statute authorizing the indorsement of contracts in writing for the payment of money so as that action may be brought thereon in the name of each successive indorsee;[3] that a judgment is not a written instrument within the meaning of the statute requiring original instruments, or copies, to be filed in actions founded thereon,[4] nor within the meaning of a statute declaring that all contracts which under the common law are joint shall be considered as joint and several.[5]

§ 5. **Classification with Reference to Stage of the Proceedings.** — Judgments, considered in reference to the stage of the proceedings at which they are entered, are of four sorts:—

1. Where the facts are admitted and the law disputed, as on demurrer;

2. Where the law is admitted and the facts disputed, as in case of verdict;

3. Where both the law and the facts are admitted, as in cases of confession or upon default;

4. Where the plaintiff is convinced that the facts or the law, or both, are insufficient to support his action, and therefore abandons or withdraws his prosecution, as in judgment upon nonsuit or *retraxit*.[6]

[1] McDonald *v.* Dickson, 87 N. C. 404.
[2] Jordan *v.* Robinson, 15 Me. 168.
[3] Lovins *v.* Humphries, 67 Ala. 437.
[4] Conwell *v.* Conwell, 100 Ind. 437.
[5] Sheehan and Loler Trans. Co. *v.* Sims, 28 Mo. App. 64.
[6] 3 Bla. Com. 396; Jacob's Law Dict.; Derby *v.* Jacques, 1 Cliff. 432; Blaikie *v.* Griswold, 10 Wis. 293.

This classification, though acquiesced in for a long time, is neither accurately expressed nor correctly illustrated. There are individual cases where the law is admitted and the facts disputed, but such cases do not form themselves into a distinct class. The law arising upon a verdict is not brought to the attention of the court by any pleading, yet, far from being admitted, it is frequently the subject of animated and lengthy contests, both in subordinate and in appellate courts. Nor is it certain, as implied by the third subdivision, that there is any class of cases where both the law and the facts are admitted. A default in no instance authorizes any judgment to be rendered against the defendant unless a sufficient cause of action is stated in the complaint. If there is any case where the law is admitted so as to subject the defendant to a judgment which would otherwise be regarded as erroneous, it must be where a default, or other confession of facts, is accompanied by such circumstances as create a presumption that he agreed to waive all errors. This would amount to an agreement to relinquish his right to reverse a judgment unsupported by law, but not to an admission that the law, applied to the undisputed facts, would properly result in a judgment against him.

§ 6. **Classification with Reference to State of the Pleadings.** — Perhaps a better classification of judgments would be one made with reference to the state of the pleadings at the time the court makes its final decision. Such a classification would not differ materially from the one heretofore given; but it could be more simply and clearly expressed. According to it, the classes would be as follows:—

1. The judgment rendered where the pleadings presented no other issue than an issue of law.

2. The judgment rendered upon the decision of a court or a jury upon the issue or issues of fact made by the pleadings.

3. The judgment given where no issue has been made by the party required to plead.

4. Where, before or after the joining of an issue of law or of fact, the plaintiff abandons or withdraws his prosecution.

§ 7. **Various Kinds of Judgments, and how Classified.** —In the first class of either classification are included:—

1. The judgment given for the plaintiff, when an issue of law, formed by a demurrer to any of the pleadings in chief, is determined in his favor. It is final, and is called a judgment *quod recuperet.*[1]

2. The judgment given for defendant when a like issue is found in his favor.

3. Judgment of *respondeat ouster*, a species of interlocutory judgment for the plaintiff, on demurrer to a plea in abatement, when it appears that the defendant has mistaken the law on a point not affecting the merits of the case. By this judgment he is allowed to plead such further defense as he may have.[2]

4. The judgment given for the defendant on a demurrer to a plea in abatement, which is, that the writ be quashed.

In the second class are included:—

1. The judgment for plaintiff upon an issue of fact found in his favor.

2. The judgment of *nil capiat per breve*, or *per billum*, when such issue is determined in his favor.

3. Judgment *quod partes replacitent.* This is given if an issue be formed and a verdict returned on so immaterial a point that the court cannot know for whom to give judgment. The parties must then reconstruct their pleadings, beginning at the first fault which occasioned the immaterial issue.

[1] Hale *v.* Lawrence, 22 N. J. L. 72.

[2] At the present time this is the judgment usually entered, instead of a judgment *quod recuperet*, on overruling a demurrer to plaintiff's complaint: Heyfrom *v.* Miss. Union Bank, 7 Smedes & M. 434; Randolph *v.* Singleton, 13 Smedes & M. 439; Trow *v.* Messer, 32 N. H. 361; Cooke *v.* Crawford, 1 Tex. 9; 46 Am. Dec. 93.

The third class includes:—

1. Judgment *nihil dicit*, rendered whenever the defendant fails to plead to the plaintiff's declaration in the time allowed for him to do so. This judgment is proper, although the defendant who fails to plead in time may have appeared by attorney.[1]

2. Judgment *non sum informatus* is the one rendered when the defendant enters upon the record that he is not informed of any defense to the action.

3. Judgment by confession *relicta verificatione*, entered when the defendant either confesses the action in the first instance, or when, after pleading, he, before trial, abandons his plea.

4. The judgment *non obstante veredicto*. This is rendered when the plea confesses a cause of action, and the matter relied upon in avoidance is insufficient, although found true, to constitute either a defense or a bar to the action.[2] This judgment can be entered only on the application of the plaintiff,[3] made after the verdict, and before the entry of judgment thereon.[4] The defendant was not, at the common law, entitled to this judgment under any circumstances. If a verdict for the plaintiff was not supported by the pleadings, the remedy of the defendant was

[1] Stewart *v.* Goode, 29 Ala. 476; citing 6 Comyn's Dig. 147.

[2] Dewey *v.* Humphrey, 5 Pick. 187; Fitch *v.* Scot, 1 Root, 351; Bellows *v.* Shannon, 2 Hill, 86; State *v.* Commercial Bank, 6 Smedes & M. 218; 45 Am. Dec. 280; Sullenberger *v.* Gest, 14 Ohio, 204; Pim *v.* Grazebrook, 2 Com. B. 429; 3 Dowl. & L. 454; Moye *v.* Petway, 76 N. C. 327; Oades *v.* Oades, 6 Neb. 304; Atkinson *v.* Davies, 11 Mees. & W. 236; 2 Dowl., N. S., 778; 12 L. J. Ex. 169; Berwick *v.* Duncan, 3 Ex. 644; Cook *v.* Pearce, 8 Q. B. 1044; Ward *v.* Phillips, 89 N. C. 215.

[3] Schermerhorn *v.* Schermerhorn, 5 Wend. 513; Smith *v.* Smith, 4 Wend. 468. The proper course for a defendant against whom judgment has been rendered upon pleadings which will not sustain a recovery is by motion *in arrest:* Bellows *v.* Shannon, 2 Hill, 86.

[4] Harrison *v.* G. N. R'y Co., 11 Com. B. 542; 21 L. J. Com. P. 16; Beaty *v.* Warren, 4 Madd. & G. 158; 4 Scott N. R. 725; State *v.* Bank, 6 Smedes & M. 218, on authority of 2 Tidd's Practice, 840. As to cases where this judgment may be given, see Shepherd *v.* Halls, 2 Dowl. 453; Britton *v.* Fisher, 26 U. C. Q. B. 338; Kerr *v.* Straat, 8 U. C. Q. B. 82; Madrall *v.* Thellusen, 21 L. J. Q. B., N. S., 410; Leigh *v.* Lillie, 6 Hurl. & N. 165; Snyder *v.* Robinson, 35 Ind. 311; 9 Am. Rep. 738; Lough *v.* Thornton, 17 Minn. 253; Morris *v.* Zeigler, 71 Pa. St. 450; Glading *v.* Frick, 88 Pa. St. 460; Chapman *v.* Holding, 60 Ala. 522; Pim *v.* Grazebrook, 2 Com. B. 429; 3 Dowl. & L. 454; Willoughby *v.* Willoughby, 6 Q. B. 722; 9 Jur. 498.

to move to arrest the judgment.[1] The party in whose favor a verdict is is not entitled to a judgment *non obstante veredicto*, under the code of Indiana. He cannot, by moving therefor, obtain a judgment not warranted by his verdict.[2] In some states the practice prevails, in certain cases, of having the jury return a general verdict, and also to find upon special issues submitted to them; and where the general verdict and the special findings are irreconcilable, to give preference to the latter. Under this practice, the party in whose favor the special issues are found may move for and obtain judgment in his favor, though the general verdict is against him.[3] Such judgment, however, does not correspond to the judgment *non obstante veredicto* of the common law. It is not, as the latter was, founded on any defects in the pleadings. Moreover, it is not in opposition to the verdict; for, under the statute, it is the findings upon the special issues which must be regarded as *the verdict*, and upon them the judgment must be pronounced.

The fourth class comprises:—

1. Judgment of *non pros.*, entered against the plaintiff, before any issue is joined, for not declaring, replying, or surrejoining, or for not entering the issue agreeably to the rules of the court.

2. Judgment on *nolle prosequi*, which is entered when plaintiff declares that he will not further prosecute his suit as to the whole or a part of his cause of action, or as to some or all of the defendants. Of a similar nature is the entry of a *stet processus*, by which plaintiff agrees that all further proceedings shall be stayed. This entry is usually made when the defendant becomes insolvent pending the action, and the object is to prevent his obtaining a judgment, as in case of nonsuit.[4]

[1] Quimby *v.* Root, 8 Col. 194; Smith *v.* Powers, 15 N. H. 546; Bowdre *v.* Hampton, 6 Rich. 208; Buckingham *v.* McCracken, 2 Ohio St. 287; Bradshaw *v.* Hedge, 10 Iowa, 402.

[2] Brown *v.* Searle, 104 Ind. 218.

[3] Felton *v.* Chicago, R. I., & P. R. R. Co., 69 Iowa, 577; Porter *v.* Waltz, 108 Ind. 40; Cox *v.* Ratcliffe, 105 Ind. 374.

[4] Tidd's Practice, 681, 682.

3. Judgment of *retraxit.* This is given when the plaintiff, in person,[1] voluntarily goes into court and enters on the record that he is in nonsuit, or that he withdraws his suit. "A *retraxit* differs from a nonsuit in this: one is negative, and the other positive. The nonsuit is a mere default or neglect of the plaintiff, and therefore he is allowed to begin his suit again upon payment of costs; but a *retraxit* is an open voluntary renunciation of his claim in court, and by this he forever loses his action."[2]

4. Judgment of nonsuit; which is of two kinds, voluntary and involuntary. When plaintiff abandons his case and consents that judgment go against him for costs, it is voluntary. But when he, being called, neglects to appear, or when he has given no evidence on which a jury could find a verdict, it is involuntary. "Where a plaintiff is demanded and doth not appear, he is said to be in nonsuit. And this usually happens where, on the trial, and when the jury are ready to give their verdict, the plaintiff discovers some error or defect in the proceedings, or is unable to prove some material point for want of witnesses."[3]

§ 8. **Judgment Capiatur, Misericordia, and in Actions of Partition and Account.**—The defendant who in a civil action was convicted of a wrong committed *vi et armis* was obliged to pay a fine to the king for the breach of the peace implied in the act. A judgment *capiatur* was entered against him, under which he was liable to be arrested and imprisoned until the fine was paid. A judgment, sometimes given at common law, against a party for the unjust vexation occasioned by his action was called judgment *misericordia.* The interlocutory judgment in an action for partition directing a partition to be made was called judgment *quod partitio fiat;* while a final judgment in such action *quod partitio facto firma et*

[1] Thomason *v.* Odum, 31 Ala. 108; 68 Am. Dec. 159.
[2] 3 Bla. Com. 296; Thomason *v.* Odum, 31 Ala. 108; 68 Am. Dec. 159.
[3] 7 Bac. Abr. 214.

*stabilis in perpetuum* was entered after the return of the writ.[1] The interlocutory judgment in an action of account compelling defendant to account was named judgment *quod computet.*

§ 9. **Definition of Decree.** — Daniell, in his Practice in the High Court of Chancery, says that a "decree is a sentence or order of the court pronounced on hearing and understanding all the points in issue and determining the rights of all the parties in the suit according to equity and good conscience."[2] It is to be hoped that decrees generally conform to the description here given of them. They are none the less decrees, however, if pronounced without hearing or understanding the points in issue. Neither is it necessary to their existence or validity that the rights of the parties be determined according to equity and good conscience. The chief differences between decrees in equity and judgments at common law are as follows: The former are pronounced by courts of equity; the latter, by courts of law. The former result from an investigation and determination of the rights of the parties by the means provided and according to the principles recognized in equity jurisprudence; the latter result from an investigation and determination made by the more limited means and more inflexible rules of the common law. The former may be adjusted to all the varieties of interest and of circumstance, and may contain such directions as are needed to carry them into effect, both in letter and in spirit; the latter are in an invariable form, general in terms, and absolute for plaintiff or defendant. And the former often enforce rights not recognized by the common law, and which, without the aid of courts of equity, could be enforced only by the consciences of men.

§ 10. **Decree Nisi.** — A decree *nisi* is the decree given under the English practice when the cause is called for

[1] 5 Bac. Abr. 292.

[2] 4 Daniell's Chancery Practice, 1192.

hearing and the defendant does not appear to open his answer. Upon proof of the service of the subpœna to hear judgment, the court will enter such decree for the plaintiff as his counsel may desire, accompanying it with a clause to the effect that it is to be binding, unless, being served with process, the defendant shall, within a given time, show cause to the contrary.

§ 11. **Decree Taken pro Confesso.** — A decree taken *pro confesso* is one entered when the defendant has made default by not appearing in the time prescribed by the rules of the court. A decree *nisi* is drawn by the plaintiff's counsel, and is entered by the court as it is drawn. A decree where the bill is taken *pro confesso* is pronounced by the court after hearing the pleadings and considering the plaintiff's equity.

§ 12. **Classifications Common to Both Judgments and Decrees.** — Both judgments and decrees, considered in relation to the jurisdiction in which they were rendered, are either foreign or domestic. Considered with regard to their effect in putting an end to an action, they are either final or interlocutory. Any judgment or decree, leaving some further act to be done by the court, before the rights of the parties are determined, and not putting an end to the action in which it is entered, is interlocutory. But if it so completely fixes the rights of the parties that the court has nothing further to do in the action, then it is final. A final judgment or decree may merely dispose of the action, leaving the plaintiff at liberty to commence another suit on the same cause, as in case of a dismissal or voluntary nonsuit by the plaintiff; or it may, besides disposing of the action, determine all the issues involved in the suit, and become a bar to all other suits between the same parties in reference to the same subject-matter.

§ 13. **Judgments in Rem and in Personam.** — Judgments and decrees are either *in personam* or *in rem*.

They are *in personam* when the proceedings are against *the person*, provided the adjudication be of such a nature as to be binding only upon the parties to the suit and their privies in blood or estate. Judgments and decrees *in rem* are not, as the term implies, confined to proceedings where property is proceeded against as a party to the action, but include, in addition to adjudications against *the thing*, all those decisions or sentences which, by the policy of the law, are binding upon all other persons as well as upon the parties to the suit. The proceedings prior to the judgment or decree may be *in personam*, no notice need be given except to the defendant, yet if the judgment affect the *status* of any person or of any subject-matter, as in a suit for divorce, it is conclusive upon the whole world, and is therefore classed as being *in rem*. The general nature of this class of judgments, and the various definitions given by different authors, will be considered in a subsequent chapter.

§ 14. **Judgments under the Code.** — The code of procedure adopted by several states providing that there shall be but one form of civil actions defines a judgment to be "the final determination of the rights of the parties in an action or proceeding."[1] This definition is, in one respect, more comprehensive than the one first given in this chapter, as it includes the final decrees of courts of equity. In another respect it is less comprehensive, because it excludes all interlocutory judgments. It is just broad enough to comprise all final judgments and all final decrees,[2] and narrow enough not to comprise any which is less than final. There can, under the codes, be no such thing as an interlocutory judgment in any case.[3]

[1] N. Y. Code, sec. 1200; Kan. Code, sec. 395; Nev. Prac. Act, sec. 144; Or. Code, sec. 240; Cal. Code Civ. Proc., sec. 577; Rev. Stats. Idaho, ed. 1887, sec. 4350; Rev. Stats. Ohio, ed. 1890, sec. 5310; Neb. Code Civ. Proc., sec. 428; Sanborn and Berryman's Wis. Stats., sec. 2882; Hughes *v.* Shreve, 3 Met. (Ky.) 547. "Every final adjudication of the rights of the parties in an action is a judgment": McClain's Iowa Stats., sec. 4056.

[2] State *v.* McArthur, 5 Kan. 280.

[3] Belmont *v.* Ponvert, 3 Robt. 696; Sellers *v.* Union L. Co., 36 Wis. 398; Singer *v.* Heller, 40 Wis. 544.

§ 15. **Orders.** — The class of judgments and of decrees formerly called interlocutory is included in the definition given in the code of the word "order." "Every direction of the court or judge made or entered in writing, and not included in a judgment, is an order."[1] The supreme court of California, in one of its earliest decisions, asked the question, "What, then, is the distinction between an order and a final judgment?" and answered it by saying: "The former is a decision made during the progress of the cause, either prior or subsequent to final judgment, settling some point of practice or some question collateral to the main issue presented by the pleadings and necessary to be disposed of before such issue can be passed upon by the court, or necessary to be determined in carrying the execution into effect."[2] The same tribunal, in a subsequent opinion, said: "An order is the judgment or conclusion of the court upon any motion or proceeding. It means cases where a court or judge grants affirmative relief, and cases where affirmative relief is denied."[3] In New York it has been decided that the decision of a court overruling a demurrer and allowing the defendant time to answer is not an order, but a judgment. The grounds upon which this conclusion was based were: 1. That an order is the decision of a motion, while a judgment is the decision of a trial; 2. That a trial is an examination of an issue of law or of fact; and 3. That as a decision upon demurrer necessarily involves an examination of an issue of law, it is a decision upon a trial, and is therefore a judgment.[4] If this reasoning be correct and the premises assumed be true, it follows that there can, under the code, be two judgments, or in other words, two final determinations of the rights of the parties in the same action. The code defines a judgment, but does not define it to be nothing more than "the decision of a trial." Only those de-

[1] N. Y. Code, sec. 767; Nev. Code, sec. 458; Kan. Code, sec. 521; Or. Code, sec. 513; Cal. Code Civ. Proc., sec. 1003.

[2] Loring *v.* Ilsey, 1 Cal. 27.

[3] Gilman *v.* Contra Costa Co., 8 Cal. 57.

[4] King *v.* Stafford, 5 How. Pr. 30; Bentley *v.* Jones, 4 How. Pr. 335.

cisions of trials amounting to final determinations of the rights of the parties answer to the definition given of a judgment. Hence it is obvious that an order overruling a demurrer, but giving the defendant an opportunity to answer, is not a judgment within the meaning of the code; and whether this be true or not, there is no dissent from the proposition that the sustaining or overruling of a demurrer, unless followed by the entry of a final judgment disposing of the action or proceeding, is not a judgment within the meaning of a statute permitting appeals from judgments.[1]

PART II. — FINAL JUDGMENTS.

**§ 16. Put an End to the Suit.** — The twenty-fifth section of the judiciary act of the United States provides that a *final* judgment or decree in any suit in the highest court of law or of equity of a state in which a decision of the suit can be had may, in certain cases therein specified, be re-examined and reversed or affirmed in the supreme court of the United States. The statutes of the several states also generally provide for appeals to their highest courts from *final* judgments and decrees in the subordinate courts. Hence it has frequently been necessary to determine, both in the state and in the federal courts, whether a given judgment or decree was final within the meaning of the statute authorizing appeals. A like necessity existed at common law. Thus in *Metcalfe's Case*,[2] "it was resolved that no writ of error lies till the last judgment." Lord Ellenborough declared "error can only be brought on final judgment";[3] and there are many other determinations to be found among the common-law reports to the same general effect.[4] There is no

[1] Elwell *v.* Johnson, 74 N. Y. 80; Cambridge V. N. B. *v.* Lynch, 76 N. Y. 514; Rose *v.* Gibson, 71 Ala. 35; Kirchner *v.* Wood, 48 Mich. 199; Gage *v.* Eich, 56 Ill. 297.

[2] 11 Coke, 68.

[3] Samuel *v.* Judin, 6 East, 333; 1 N. R. 43; Scott *v.* Bennett, L. R. 5 H. L. Cas. 234; 5 I. R. C. L. 375; 20 Week. Rep. 686.

[4] Mayor of Macclesfield *v.* Gee, 14 Mees. & W. 470; Shepherd *v.* Sharp, 1 Hurl. & N. 114; Grand Trunk R'y Co. *v.* Amey, 20 U. C. C. P. 6; Tolson *v.* Kaye, 7 Scott N. R. 222; 6 Madd. & G. 536.

doubt that, in order to come within these statutes or to satisfy the tests applied by the common law, the judgment or decree need not finally determine the rights of the parties litigant; it is sufficient if it ends the particular suit in which it is entered.[1]

Every definite sentence or decision by which the merits of a cause are determined, although it is not technically a judgment, or although the proceedings are not capable of being technically enrolled so as to constitute what is technically called a record, is a judgment within the meaning of the law. According to the common-law rule, by a final judgment is to be understood, not a final determination of the rights of the parties, but merely of the particular suit.[2] Therefore a judgment of nonsuit,[3] or of dismissal without prejudice, or in favor of plaintiff or defendant upon a plea in abatement,[4] or in an action of ejectment where the law denies to a judgment in that action the effect of *res judicata*,[5] because each terminates the action in which it is entered, is final, though the parties may in a subsequent action be permitted to relitigate issues presented in the former action which has gone to judgment. If a judgment, though upon the merits or determining some substantial right, leaves necessary further judicial action before the rights of the parties are settled, it is not final.[6] A judgment is final, notwithstanding the addition to the record of the words "unless the supreme court shall reverse the rulings of this court and set aside said judgment of nonsuit."[7] If, however, a judgment is imperfect and uncertain, but is to be made perfect and

[1] Weston *v.* City of Charleston, 2 Pet. 449; Ludlow's Heirs *v.* Kidd's Ex'rs, 3 Hamm. 541; Helm *v.* Short, 7 Bush, 623.

[2] Belt *v.* Davis, 1 Cal. 138; Klink *v.* Steamer Cusseta, 30 Ga. 504.

[3] Box *v.* Bennett, H. Black. 432; Hitchins *v.* Hollingsworth, 7 Moore P. C. C. 228; Hartford F. I. Co. *v.* Green, 52 Miss. 332; West *v.* Bagly, 12 Tex. 34; 62 Am. Dec. 512; Corning T. Co. *v.* Pell, 4 Col. 184.

[4] McCartee *v.* Chambers, 6 Wend. 649; 22 Am. Dec. 556; New York D. D. Co. *v.* Treadwell, 19 Wend. 527; Jewett *v.* Davis, 6 N. H. 518.

[5] Weston *v.* City Council, 2 Pet. 449.

[6] Benjamin *v.* Dubois, 118 U. S. 46; Coons *v.* Harllee, 17 Fla. 484; Bostwick *v.* Brinkerhoff, 106 U. S. 3.

[7] Wood *v.* Coman, 56 Ala. 283.

certain by the action of some non-judicial person, as where it is to be released on payment of such sum as M. shall say is due,[1] or is confessed for a sum "to be liquidated by attorneys," it is final.[2]

A judgment "that the defendant go hence, and that he recover his costs, etc.," though not very formal, is a good final judgment, because no further action can be taken while it remains in force.[3] But a judgment for costs alone, though entered for defendant, after the jury have found a verdict in his favor, it seems is not final, and cannot therefore be made the subject of revision after appeal. The reasons urged against regarding such a judgment as final are, that it does not dismiss the defendant without day, nor state that plaintiff shall take nothing by his suit, nor in any way nor by any terms profess to dispose of the subject-matter of the litigation.[4]

It is fatal to the claim that a particular order or direction of the court is a judgment, that it appears to be but preliminary to the final, formal action of the court, as where it is a direction that judgment be entered, though it is sufficiently specific to enable the attorneys or the clerk to draught a judgment in conformity therewith.[5] An exception to this rule prevails in Massachusetts. By the practice in that state, "an entry upon the docket in a suit in equity of 'bill dismissed' is of itself a final decree; and a more formal order, though convenient and proper for the regular completion of the record, is not essential, and if afterwards drawn up is a mere extension of the final decree already entered, and has relation to the entry of that decree"; and the mere entry upon the docket of "bill dismissed" may at once be appealed from as a final decree.[6]

[1] Turner *v.* Plowden, 5 Gill & J. 52; 23 Am. Dec. 596.

[2] Commonwealth *v.* Baldwin, 1 Watts, 54; 26 Am. Dec. 33.

[3] Rogers *v.* Gosnell, 51 Mo. 468; Smith *v.* Mayor of Boston, 1 Gray, 72.

[4] Warren *v.* Shuman, 5 Tex. 450; Higbee *v.* Bowers, 9 Mo. 354; Neyland *v.* White, 25 Tex. 319; Green *v.* Banks, 24 Tex. 522; Scott *v.* Burton, 6 Tex. 332; 55 Am. Dec. 782; Eastham *v.* Sallis, 60 Tex. 576.

[5] Macnevin *v.* Macnevin, 63 Cal. 186; Eastham *v.* Sallis, 60 Tex. 576; Gilpatrick *v.* Glidden, 82 Me. 201; Blount *v.* Gallaher, 22 Fla. 92.

[6] Snell *v.* Dwight, 121 Mass. 348.

§ 17. **Dismissal.** — The dismissal of a suit by the plaintiff is a judgment within the meaning of the code. Where in a suit a temporary injunction has been issued, and the plaintiff, after giving bonds to secure the payment of all damages which may be occasioned by reason of the injunction being improperly issued, dismisses his suit, or permits it to be dismissed for want of prosecution, such dismissal is a final judgment, and an adjudication that the injunction ought not to have issued, on which an action may be maintained on the bond for all damages resulting from the injunction. Although in case of a judgment by dismissal the issues are neither examined nor passed upon by the court, yet by the failure of the plaintiff to prosecute his action, they are virtually confessed. A dismissal under such circumstances, while it does not estop the plaintiff from maintaining a new suit on the same cause of action, does dispose of the rights of the parties in the action in the same manner as if there had been an adjudication on the merits.[1]

§ 18. **Judgment Vacating Another Judgment.** — When in an action to set aside a judgment the court grants the prayer of the complaint and awards a new trial, the order setting aside the judgment is a final judgment, and, as such, may be appealed from. The whole scope and object of the suit being to vacate the former judgment, and to procure a new trial, and the issues all being made up for that purpose, their determination necessarily puts an end to the suit.[2]

§ 19. **Judgment of Condemnation.** — In a proceeding by a railroad company to condemn lands, or a right of way across lands, where the parties in interest are sum-

[1] Dowling *v.* Polack, 18 Cal. 625; Loomis *v.* Brown, 16 Barb. 325; Shearman *v.* N. Y. Central Mills, 11 How. Pr. 269; Coates *v.* Coates, 1 Duer, 664; Leese *v.* Sherwood, 21 Cal. 163; Gill *v.* Jones, 57 Miss. 367; Rodgers *v.* Russell, 11 Neb. 361; Bowie *v.* Kansas City, 51 Mo. 454; Sloppenbach *v.* Zohrlant, 21 Wis. 385.

[2] Belt *v.* Davis, 1 Cal. 134; McCall *v.* Hitchcock, 7 Bush, 615; State *v.* Allen, 92 Mo. 20. See, however, Dorsey *v.* Thompson, 37 Md. 25.

moned to appear and contest with the petitioners, and where commissioners are appointed to assess the value of the property sought to be condemned, and a report is made by them and confirmed by the court, and the court adjudges that the petitioners have brought themselves within the provisions of the act providing for the condemnation, the action of the court is a final judgment within the meaning of the section of the Practice Act allowing an appeal from a final judgment entered in an action or special proceeding.[1]

§ 20. **Must not Leave Issues to be Settled.** — Sometimes several issues of law and of fact are presented for the consideration of the court in the same suit or proceeding. In such case there can be no judgment from which an appeal can be taken while it remains necessary for the court to determine some issue of law or of fact.[2] It is not true that a final judgment always settles all the issues presented by the pleadings. A finding upon some of the issues may remove all necessity for considering others, and the court, judging them to be, in view of the findings made, immaterial, may pronounce judgment, leaving them undetermined. Such judgment is nevertheless final, because there remains no issue which will be the subject of any further consideration or action. At the common law, a demurrer was treated as an admission of the allegations of the complaint, and therefore removed from the case all issues of fact, and left nothing for judicial action save an issue of law. The determination of that disposed of all the issues in the case, and the judgment entered therein was final. Under the practice generally prevailing at the present time, a demurrer is not regarded as a confession, except for the purpose of testing the sufficiency of the pleading to which it is interposed. If it is sustained, the pleading is allowed to be amended;

[1] S. P. & N. R. R. Co. *v.* Harlan, 24 Cal. 337; Hunter's Private Road, 46 Pa. St. 250.

[2] Texas Pac. R'y *v.* Ft. W. R'y, 75 Tex. 83; Low *v.* Crown Point M. Co., 2 Nev. 75; King *v.* Barnes, 107 N. Y. 645.

if it is overruled, the right to answer is not denied. In either event, issues of fact may arise, and it is not until it is known that the plaintiff will not amend his complaint, or that the defendant will not by his answer form an issue of fact, that final judgment can be entered on the demurrer.

Though no issue is presented by the pleadings, there may be questions which the court must determine as though there were an issue thereon. If so, the judgment cannot be final while a question remains to be judicially answered. Thus though the defendant has made default, and thereby confessed the allegations of the complaint, the statute or the well-established practice of the court may require evidence to be heard before the court can assess the damages, or determine the nature and extent of some other kind of relief sought by plaintiff; and it is not until the damages have been assessed, the amount of the recovery fixed, or the extent of the other relief judicially ascertained and pronounced, that there can be a final judgment. Whatever is judicially done before that is but one of several steps toward the final judgment, from which alone an appeal may be taken.[1] But, on the other hand, if the amount of a recovery can be made certain "by mere calculation, the judgment is final."[2]

An order dismissing a cross-bill does not authorize the entry of a final judgment thereon, if there is an answer to the original complaint or bill by which issues are formed, and which must be settled before the case can be disposed of. There cannot be a final judgment on the cross-bill, and after that another final judgment disposing of the other issues.[3]

§ 21. **Not Always a Final Adjudication.**—A judgment may be final so as to authorize an appeal from the court

[1] Daniel *v.* Cooper, 2 Houst. 506; Maury *v.* Roberts, 27 Miss. 225; Clements *v.* Berry, 11 How. 398; Phillips *v.* Hellings, 5 Watts & S. 44; Coons *v.* Harllee, 17 Fla. 484; Tuggle *v.* Gilbert, 1 Duvall, 340; Deickart *v.* Rutgers, 45 Mo. 132; Hunter *v.* Hunter, 100 Ill. 519.

[2] Sellers *v.* Burk, 47 Pa. St. 344; Adickes *v.* Allison, 21 S. C. 245.

[3] Low *v.* Crown Point M. Co., 2 Nev. 75; Fleece *v.* Russell, 13 Ill. 31.

in which it was rendered, without being final as to the subject-matter in litigation. An appeal may be taken, in which case the judgment of the inferior tribunal is not final as to the subject-matter, because it may be changed by the appellate court. Thus a covenant in a deed that if the title to certain lands were not confirmed to the covenantor by the courts of the United States before which it was pending, upon the final adjudication of the same, the covenantor would pay a sum of money, does not become a cause of action, when the district court refuses to confirm the title and declares it invalid. Until the time for appeal has elapsed, or until the judgment of the highest court in which the suit could be determined has pronounced against the validity of the title, there has been no such final adjudication as was intended by the parties to the covenant.[1]

§ 21 a. **In Criminal Prosecutions** the same policy with respect to appeals prevails as in other cases. The judgments which may be reviewed by appeal or otherwise must be final; and, generally, no judgment will be regarded as final unless it condemns the prisoner to be punished, and sets forth particularly the amount, duration, and place of punishment.[2] The defendant cannot appeal from an order sustaining a demurrer to his plea of *autrefois acquit*.[3] Evidently an order overruling a demurrer to an indictment cannot be appealed from as a final judgment, for it leaves the issues of fact yet to be tried, and judgment thereon yet to be pronounced.[4] It has also been determined that no appeal can be taken where the court sustains a demurrer to an indictment, but enters no formal final judgment in favor of the defendant.[5] In California a different rule prevails, and the reasons for its adoption were very clearly and forcibly stated by Mr. Justice Crockett, in *People* v. *Ah Own*, 39 Cal. 606, in the following

[1] Hills *v.* Sherwood, 33 Cal. 474.
[2] Anschincks *v.* State, 43 Tex. 587; Mayfield *v.* State, 40 Tex. 289; Fulcher *v.* State, 38 Tex. 505.
[3] State *v.* Horneman, 16 Kan. 452.
[4] People *v.* Hall, 45 Cal. 253.
[5] State *v.* Gregory, 38 Mo. 501; State *v.* Mullix, 53 Mo. 355.

language: "This is an appeal from an order sustaining a demurrer to an indictment for kidnaping. The order sustaining the demurrer is in the usual form; but no other or further order or judgment was entered, and the appeal is taken from this order, treating it as a final judgment or disposition of the case. The objection is urged that no appeal will lie from an order sustaining a demurrer to an indictment; that to entitle the state to an appeal, there must be a formal and final judgment; and it is claimed that the order sustaining the demurrer, standing alone, cannot be deemed a final judgment from which an appeal will lie. But we think the point is not well taken. A defective indictment is not subject to amendment, and when decided on demurrer to be insufficient, the cause is finally ended. Section 144 of the code defines a judgment to be 'the final determination of the rights of the parties to the action or proceeding'; and it is evident that the final order which decides the matters at issue, adjudicates the rights of the parties, and ends the litigation, must be deemed a final judgment for the purposes of an appeal. In civil actions an order sustaining a demurrer to the complaint is not an appealable order, for the reason that the complaint is amendable, and the sustaining a demurrer to it does not end the litigation. It is not a final determination of the rights of the parties. But in a criminal prosecution it is otherwise, and when a demurrer is sustained, the action is finally ended in that court. Nothing more remains to be done. It is true, in proper cases, if the defendant is in custody, the court may detain him to answer another indictment to be found by another grand jury. But the first indictment is, nevertheless, finally disposed of by the demurrer, and the order sustaining which may for that reason be properly deemed to be a final judgment."

§ 21 b. **A Judgment Dismissing an Attachment** under the code of Georgia has been held by the supreme court

of that state to be so far final as to be subject to review on writ of error "for the reason that the whole attachment element was disposed of by dismissing the attachment. The decision was final as to it, and any judgment which the plaintiff might recover on his declaration thereafter would have no aid from the levy of the attachment. It would take lien only from the date of the judgment, and the security of the replevy bond would be lost. To maintain his attachment, it was the right of the plaintiff to have the judgment dismissing it reviewed by a separate writ of error."[1] These reasons are very persuasive, if addressed to the question whether the statute ought to be amended so as to sanction appeals from orders dismissing, dissolving, or otherwise annulling or impairing writs of attachment or levies made thereunder. The fact that a ruling may be very disastrous to one of the parties does not necessarily entitle it to take rank as a final judgment. The refusal to postpone the time of trial, the exclusion or admission of particular evidence, the giving or refusing to give an instruction, and many other judicial acts, may be decisive of a case; but this does not convert them into judgments, and entitle the injured party to at once test their correctness by appeal. So, we apprehend, the dismissal, dissolving, or quashing of an attachment or of the levy thereof is not reviewable as a final judgment.[2] But if garnishment proceedings are instituted against an alleged debtor, and jurisdiction is acquired over him, and after he has answered a judgment is entered discharging him, this, so far as he is concerned, is a final judgment exhausting the jurisdiction of the court over him, and a judgment subsequently entered against him is void.[3]

§ 21 c. **An Order Dismissing a Petition for Intervention** is, in Texas, not subject to review as a final judgment.

[1] Bruce *v.* Conyers, 54 Ga. 680; Sutherlin *v.* Underwriters' Agency, 53 Ga. 442.

[2] Cutter *v.* Gumbertz, 8 Ark. 449; Woodruff *v.* Rose, 43 Ala. 382; Butcher *v.* Taylor, 18 Kan. 558; Wearen *v.* Smith, 80 Ky. 216.

[3] Jackson *v.* St. L. & S. F. R'y Co., 89 Mo. 104.

The petitioner or intervener must wait until the issues between the plaintiff and defendant are determined and their rights fixed by a final judgment, before he can appeal.[1] The rule is otherwise in California[2] and Louisiana,[3] whether the order be one denying leave to file a complaint of intervention, or sustaining a demurrer thereto when filed, and entering judgment thereupon against the intervener.

§ 22. **Final Adjudications in Equitable Proceedings.** — Considerable difficulty has been experienced in determining what is a final judgment, under the code, in equitable proceedings, and what is a final decree, where the proceedings are conducted according to the practice in chancery. Perhaps the decisions are not wholly reconcilable; but their want of harmony, if it exists at all, is rather in applying than in formulating the general rules by which the answer to this question must be found. We shall first call attention to those decrees which have been declared final, and next to those which have been adjudged interlocutory, hoping that an examination of each class will assist in identifying the other.

"A decree never can be said to be final where it is impossible for the party in whose favor the decision is made ever to obtain any benefit therefrom without again setting the cause down for hearing before the court, upon the equity reserved, upon the coming in and confirmation of the report of the master, to whom it is referred to ascertain certain facts which are absolutely necessary to be ascertained before the case is finally disposed of by the court, or which the chancellor thinks proper to have ascertained before he grants any relief whatever to the complainant. But if the decree not only settles the rights of the parties, but gives all the consequential directions which will be necessary to a final disposition of the cause,

[1] Stewart *v.* State, 42 Tex. 242.
[2] Stich *v.* Dickinson, 38 Cal. 608; Coburn *v.* Smart, 53 Cal. 742.
[3] State *v.* Parish Judge, 27 La. Ann. 184.

upon the mere confirmation of the report of the master by a common order in the register's office, it is a final decree and may be enrolled at the expiration of thirty days, although the amount to which the complainant may be entitled under such decree is still to be ascertained upon a reference to a master for that purpose."[1] Owing to the number of orders or decrees necessarily entered in a suit in equity to furnish all the relief to which the complainant may be entitled, the courts have been frequently obliged to determine which is *the final* decree. So far as any general distinguishing test can be gathered from the numerous decisions, it is this: That if after a decree has been entered no further questions can come before the court except such as are necessary to be determined in carrying the decree into effect, the decree is final; otherwise it is interlocutory.[2] But an order or decree made for the purpose of carrying a judgment or decree already entered into effect is not a final judgment or decree, and cannot be appealed from as such.[3]

"The rule is well settled and of long standing, that a judgment or decree, to be final within the meaning of that term as used in the acts of Congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered."[4]

§ 23. **May Contain Directions to be Executed in Future.** — A stockholder having commenced an action against a

[1] Johnson *v.* Everett, 9 Paige, 638.

[2] Whiting *v.* Bank of U. S., 13 Pet. 6; Bronson *v.* R. R. Co., 2 Black, 524; Ogilvie *v.* Knox Ins. Co., 2 Black, 539; Humiston *v.* Stainthorp, 2 Wall. 106; Miller *v.* Cook, 77 Va. 806; Bond *v.* Marx, 53 Ala. 177; Cocke *v.* Gilpin, 1 Rob. (Va.) 20; Teaff *v.* Hewitt, 1 Ohio St. 511; 59 Am. Dec. 634; Ware *v.* Richardson, 3 Md. 505; 56 Am. Dec. 762; Beebe *v.* Russell, 19 How. 283; Cook's Heirs *v.* Bay, 4 How. (Miss.) 485.

[3] Callan *v.* May, 2 Black, 541; Smith *v.* Trabue's Heirs, 9 Pet. 4.

[4] Bostwick *v.* Brinkerhoff, 106 U. S. 3; Grant *v.* Phœnix Ins. Co., 106 U. S. 429; St. Louis, I. M., & S. R'y Co. *v.* Southern Express Co., 108 U. S. 24; Dainese *v.* Kendall, 119 U. S. 53; Keystone M. & I. Co. *v.* Martin, 132 U. S. 91.

corporation and its officers for an accounting and settlement of its affairs, a decree was, after a full hearing on the merits, entered in accordance with the prayer of the complaint. By this decree a receiver was appointed to take charge of the corporate assets until the further order of the court, to collect moneys due or to become due, sell stock, and pay the proceeds in accordance with directions given in the decree. The supreme court declared that this decree was a final judgment, and subject to appeal.[1] A decree entered in an action brought for an accounting and for a dissolution of a copartnership, granting the relief prayed for, ordering a sale of all the partnership assets, and specifying the manner in which the proceeds of such sale shall be distributed, is a final decree.[2]

§ 24. **May Require Future Orders or Proceedings.** — These decisions are fully sustained by several of the decisions of the courts of the state of New York. Although further proceedings before the master are necessary to carry the decree into effect, yet if all the consequential directions depending on the result of the proceedings are given in the decree, it is final. A decree is none the less final because some future orders of the court may become necessary to carry it into effect;[3] nor because some independent branch of the case is reserved for further consideration,[4] or the disposition of the costs is not determined;[5] nor because, when the merits of the controversy are adjudicated upon, and the equities of the parties definitely settled, an account is directed to be taken to ascertain what sum is due from the one to the other, as the result of the decision already made by the court.[6] But in

[1] Neall *v.* Hill, 16 Cal. 145; 76 Am. Dec. 508.

[2] Clark *v.* Dunnam, 46 Cal. 204; Evans *v.* Dunn, 26 Ohio St. 439.

[3] Mills *v.* Hoag, 7 Paige, 18; 31 Am. Dec. 271; Johnson *v.* Everett, 9 Paige, 636; Quackenbush *v.* Leonard, 10 Paige, 131; Dickinson *v.* Codwise, 11 Paige, 189; Stovall *v.* Banks, 10 Wall. 583.

[4] Cannon *v.* Hemphill, 7 Tex. 184.

[5] McFarland *v.* Hall, 17 Tex. 691.

[6] Bank of Mobile *v.* Hall, 6 Ala. 141; 41 Am. Dec. 41; Thomson *v.* Dean, 7 Wall. 342; Garner *v.* Prewitt, 32 Ala. 13; Green *v.* Winter, 1 Johns. Ch. 27; 7 Am. Dec. 475; Bradford *v.* Bradley's Adm'r, 37 Ala. 453; Jones *v.* Wilson, 54 Ala. 50.

all cases where further proceedings are to be taken, or further orders of the court are necessary, the judgment cannot be treated as final, even for the purposes of appeal, unless it determines the issues involved in the action.[1] A judgment against an administrator, for a specific sum and costs, in the usual form, except that there was a clause added, to the effect that the defendant should have, during the term of the court, to make additional showing, if he could, that he had previously paid the moneys or any part thereof for which judgment was rendered against him, was held to be final, on the ground that this clause did not confer any new right nor detract from the effect of the judgment; for, as the court said, a judgment may always be opened or set aside during the term at which it was rendered.[2] A judgment against an administrator in the usual form, "to be released on the payment of such sum as Enoch J. Millard shall say is due, and costs," was also adjudged to be final, because "to make it absolute as far as regarded the amount due on the account, no further act of the court was necessary."[3]

§ 25. **Requiring Conveyance of Property.** — In the case of *Travis* v. *Waters*, 12 Johns. 500, a decree was said to be final when all the facts and circumstances material to a complete explanation of the matters in litigation were brought before the court, and so fully and clearly ascertained on both sides that the court has been enabled to collect the respective merits of the parties litigant, and upon full consideration has determined between them according to equity and good conscience. This case was for a specific performance of a contract to convey certain lands. The chancellor having made an order that the defendant, under direction of one of the masters of the court, on payment or tender to him of a certain sum of money, execute and deliver to the plaintiff a good and

[1] Perkins *v.* Sierra N. S. M. Co., 10 Nev. 405.

[2] Harmon *v.* Bynum, 40 Tex. 324.

[3] Turner *v.* Plowden, 5 Gill & J. 52; 23 Am. Dec. 596.

sufficient conveyance of the real estate in controversy, this order, though silent as to costs, was considered as within the above definition of a final decree, and the plaintiff was not permitted to set the case down for further hearing, so as to have his bill of costs put in the decree.[1]

§ 26. **Final, if Requires Delivery of Property.** — Where the assignee of a bankrupt filed his bill in equity to have the deeds of certain lands and slaves made by the bankrupt to the defendants set aside, and to have the lands and slaves delivered to the assignee, and that an account of the profits of the lands and slaves be taken, and that such profits, when ascertained, should be paid over to the assignee, the court decreed that the lands and slaves be delivered to the assignee and by him sold, and that the account of profits be taken. From this decree an appeal was taken to the supreme court of the United States, where a motion was made to dismiss the appeal because the decree was interlocutory. The motion was denied. The court said that when a decree determined the right to property, and directed it to be given to the complainant, or to be sold for his benefit, and he was entitled to have the decree carried into immediate effect, it was final within the meaning of the statute authorizing appeals; and that if no appeal were allowed from such a decree, the property in controversy could be sold, or otherwise disposed of, and thereby placed so completely beyond the reach of the defendants that an appeal at a subsequent stage of the proceedings could do them no good.[2] It seems certain, however, that if the decree under consideration in the above case had simply determined the right to the property in dispute, without giving directions for its sale, or delivery to the complainants, no appeal would have

[1] A decree is final which determines the rights of property, and directs a conveyance to be made at a *future* day. Lewis *v.* Outton's Adm'r, 3 B. Mon. 453.

[2] Forgay *v.* Conrad, 6 How. 201; Davie *v.* Davie, 52 Ark. 224; 20 Am. St. Rep. 170.

been recognized until all the issues had been determined, and such a decree entered as would have completely disposed of the suit.[1] A decree final in other respects is not interlocutory because it directs a taxation of costs;[2] nor because, as in the case of a decree for the sale of mortgaged premises, subsequent proceedings under direction of the court are necessary to execute the decree.[3]

§ 27. **Must be Final as to All Defendants.** — The order of the court in an action for the partition of real estate, which determines the several interests of the parties to the action, and appoints a referee to make a partition between them, and report the same to the court, is not a final judgment, even against a party whom the court by such order determines to be *without any title*.[4] A decree declaring a legacy void as to one defendant, but reserving all other questions, is not such a final decree as may be appealed from.[5] And, as a general rule, a judgment determining the rights of some of the parties is not final so as to authorize an appeal until it has settled the rights of *all* the defendants.[6]

§ 28. **Instances of Decrees Final, though Some Questions Remain Open.** — If a suit is brought by an express company against a railway company to compel the latter to do business for the former on the payment of lawful charges, and it is no part of the object of the suit to have such charges definitely settled for all time, a decree which establishes the express company's right, adjudges costs,

[1] Perkins *v.* Fourniquet, 6 How. 206; Pulliam *v.* Christain, 6 How. 209.

[2] Craig *v.* Steamer Hartford, 1 McAll. 91.

[3] Bronson *v.* R. R. Co., 2 Black, 531; Ray *v.* Law, 3 Cranch, 179. A decree disposing of a cause, but leaving the exact amount due to be calculated by the master, and to be by him reported at next term, is final: Meek *v.* Mathis, 1 Heisk. 534. A decree dismissing certain parts of a bill is not final: Mayor *v.* Lamb, 60 Ga. 342.

[4] Peck *v.* Vandenberg, 30 Cal. 11; Gates *v.* Salmon, 28 Cal. 320. The law has been changed by act of March 23, 1864.

[5] Chittenden *v.* M. E. Church, 8 How. Pr. 327.

[6] Harrison *v.* Farnsworth, 1 Heisk. 751; Delap *v.* Hunter, 1 Sneed, 101; Martin *v.* Crow, 28 Tex. 614; Wills *v.* State, 4 Tex. App. 613; Whitaker *v.* Gee, 61 Tex. 217; Schultz *v.* McLean, 76 Cal. 608; Commonwealth *v.* McCleary, 92 Pa. St. 188.

awards execution, and fixes compensation to be paid is final, though leave is given to the parties to apply for a modification of what has been ordered respecting charges. The effect of the decree is to require the railway to carry for a reasonable compensation, and the permission to apply for a modification in respect to charges was necessary because "the rates properly chargeable for transportation vary according to circumstances," and cannot be reasonable unless changed from time to time, and thereby fitted to changed circumstances.[1] A decree is final which directs the sale of property and fixes the rights and interests of the respective parties therein, though the officer who is to make the sale is required, after paying a specified claim, to pay the surplus in his hands to the complainant "after deducting such costs as the court shall decree to be paid out of the same."[2] A decree in other respects final is not rendered interlocutory by a direction therein contained, in aid of the execution of the decree, requiring the defendants to account concerning certain specified matters, and a reservation to the court of the right to make "such further directions as may be necessary to carry this decree into effect concerning costs, or as may be equitable and just."[3] If, in an action to recover moneys on a contract for the sale of land and to subject the land to sale for such amount as should be found due, a cross-petition is filed, alleging the existence of a cloud on plaintiff's title, and the court, after trial, adjudges that the cloud has been removed, that the complainant has deposited with the clerk deeds conveying to defendant a clear title, that a specified amount is due plaintiff, that such amount be paid to the clerk of the court within thirty days, and in default thereof that execution issue therefor, and that on payment thereof by defendant the deeds be delivered to him, the provision delaying execution and declaring that the deeds

[1] St. Louis, I. M., & S. R'y Co. *v.* Southern Express Co., 108 U. S. 24.

[2] In Matter of Norton, 108 U. S. 237; Parsons *v.* Robinson, 122 U. S. 112.

[3] Winthrop I. Co. *v.* Meeker, 109 U. S. 180.

shall be delivered only after payment, does not prevent this adjudication from being a final judgment.[1] Generally, clauses in judgments or decrees suspending their operation for a specified time, or giving defendant a period within which to make payment, and staying execution in the mean time, are not regarded as rendering interlocutory decrees which are otherwise final.[2]

§ 29. **Interlocutory Decrees Defined and Classified.** — An interlocutory decree is one made "pending the cause, and before a final hearing on the merits. A final decree is one which disposes of the cause, either by sending it out of the court before a hearing is had on the merits, or after a hearing on the merits, decreeing either in favor of or against the prayer of the bill." But no order or decree which does not preclude further proceedings in the case in the court below should be considered final.[3] A decree is interlocutory which makes no provision for costs, and in which the right is reserved to the parties to set the cause down for further directions not inconsistent with the decree already made;[4] and so is a decree which contains a provision for a reference of certain matters, and that all further questions and directions be reserved until the coming in of the report of the referee. An order or

[1] Linsley *v.* Logan, 33 Ohio St. 376.

[2] Fleming *v.* Bolling, 8 Gratt. 292; Brown *v.* Van Cleave, 86 Ky. 381. An extreme case, and one which is clearly not in consonance with the other authorities upon the subject, is that of Hastie *v.* Aiken, 67 Ala. 313. This was a suit by which complainants sought to reach a certain fund which had been in the hands of a partnership, the members of which were deceased. Demurrers interposed to the complaint were overruled, and a decree was entered declaring complainants entitled to relief and ordering a reference, 1. To ascertain whether the fund belonged to the complainants or another person; 2. To state an account between the members of the late firm, and to find what amount of the fund was in the hands of a designated third person, subject to a certain agreement, and to report what was a reasonable compensation for a trustee in whose hands the fund had been. This decree was held final and appealable, though it is impossible to determine from the report of the case that anything had been settled by it except that complainants were entitled to the fund as personal representatives of a certain decedent, if it did not belong to another person as representative of another decedent, and if on an accounting between the deceased members of the late firm something should be found due the decedent whom complainants represented.

[3] Chouteau *v.* Rice, 1 Minn. 24.

[4] Williamson *v.* Field, 2 Barb. Ch. 281; Harris *v.* Clark, 4 How. Pr. 78.

decree *pro confesso* for an injunction restraining the use of an invention is interlocutory merely,[1] but a decree dismissing a bill,[2] or dissolving an injunction and passing definitively on all the essential points in issue, is final.[3] Interlocutory decrees are entered under an infinite variety of circumstances, and the relief afforded corresponds in variety to the circumstances demanding it. It is therefore difficult, and perhaps impossible, to formulate any classification which will include every order or interlocutory judgment or decree. By far the greater number of those which are at all likely to be mistaken for final judgments or decrees fall within the following classification: 1. Those which, while they may be sufficient in form and substance to dispose of the suit, are nevertheless, by law or the uniform practice of the court, not treated as final, until the happening of some event or the lapse of some period of time; 2. Those which, though they may grant the relief sought by the suit, are temporary or conditional in their effect, and are generally entered without any previous determination of the rights of the parties; 3. Those which, while they determine the rights of the parties either in respect to the whole controversy or some branch of it, merely ascertain and settle something without which the court could not proceed to a final adjudication, and the settlement of which is obviously but preliminary to a final judgment or decree; 4. Adjudications of one or more issues, but leaving undisposed of some issue which must be settled before the rights of the parties can be finally determined; 5. Orders made in the progress of the cause, for the purpose of preserving or managing the subject-matter of the action, or bringing it within the control of the court, to the end that the final judgment may be effective; and 6. Orders, judgments, or decrees made in a cause vacating or reversing any prior judgment or decree therein, whether interlocutory or

[1] Russell *v.* Lathrop, 122 Mass. 300.

[2] Snell *v.* Dwight, 121 Mass. 348.

[3] Saloy *v.* Collins, 30 La. Ann. 63.

final, if the cause is remanded for further proceedings or the parties otherwise left at liberty to proceed to a final judgment.

§ 30. **Provisional Decrees or Judgments.** — In the first class of interlocutory decrees are those taken *nisi* or *pro confesso*. These decrees are designed only "to prepare the case for a final decree," and no matter what their provisions, they do not amount to final adjudications.[1] So under the practice in some of the states, a motion for a new trial seasonably filed is deemed to be so directly connected with the judgment that "so long as it remains undisposed of there can be no final judgment within the meaning of the statute regulating appeals."[2]

§ 31. **Temporary or Alternative Relief.** — In the second class of interlocutory decrees and judgments fall orders granting injunctions which are to be operative only during the pendency of the litigation, or until the further order of the court,[3] and orders for alternative writs by which a party is commanded to do or not to do some act, or else to show cause why he has done or refrained from doing it.

§ 32. **Settling Questions Preliminary to Final Relief.** — Instances of interlocutory decrees of the third class are very numerous. Thus if the suit is for the dissolution of a partnership, and for an accounting and a settlement of the partnership business and the division of its assets, the court may be required to determine whether any partnership existed, and if so, whether it ought to be dissolved, and what were the respective interests of the several parties before the court therein. The determination of these questions, accompanied with a direction that an account be taken, will not be deemed a final adjudication, unless

[1] Russell *v.* Lathrop, 122 Mass. 300.

[2] New York, C., & St. L. R. R. Co. *v.* Doane, 105 Ind. 92.

[3] Verden *v.* Coleman, 18 How. 86; Humeston *v.* Stainthorp, 2 Wall. 106; East & W. T. L. Co. *v.* Williams, 71 Tex. 444.

the decree is so complete that nothing remains to be done except to follow its directions.[1] In suits for partition, the courts must determine the interests of the co-tenants, and whether partition shall be made by a sale of the property, or otherwise; but it is not until the confirmation of the partition, whether by sale or allotment, that a final decree exists.[2] A decree that parties account is another familiar instance of a determination preliminary to but not constituting a final judgment.[3] A decree declaring that complainant is entitled to have lands sold to pay purchase-money or a mortgage debt due him is not final if a reference is ordered to ascertain what sum remains unpaid.[4] An action was commenced to enforce certain liens against real estate, and a judgment therein was entered directing that a sale of the premises be made, and that from the proceeds a sum specified should be paid to discharge one of the liens, and that the plaintiff should be paid an additional sum, less the amount due from him to the defendant for rent of the premises, and that a reference be had to ascertain the amount of such rent. An appeal was taken from this judgment. The appellate court, on motion to dismiss the appeal, considered that as the object of the action was to ascertain to whom the whole proceeds to be derived from a sale of the premises should belong, and that as this could not be ascertained until it was known what amount ought to be deducted from the plaintiff's claims for rents, the judgment entered by the court below was not a final judgment.[5] Obviously, a decree of fore-

[1] Gray *v.* Palmer, 9 Cal. 616; Kingsbury *v.* Kingsbury, 20 Mich. 212; Rhodes *v.* Williams, 12 Nev. 20; Cocke's Adm'r *v.* Gilpin, 1 Rob. (Va.) 20; White *v.* Conway, 66 Cal. 383.

[2] Holloway *v.* Holloway, 97 Mo. 628; 10 Am. St. Rep. 339; Turpin *v.* Turpin, 88 Mo. 337; Murray *v.* Yates, 73 Mo. 13; Green *v.* Fisk, 103 U. S. 518; Gates *v.* Salmon, 28 Cal. 320; Peck *v.* Vandenburg, 30 Cal. 11; Beebe *v.* Griffing, 6 N. Y. 465; Mills *v.* Miller, 2 Neb. 299; Gesell's Appeal, 84 Pa. St. 238. *Contra*, Ansley *v.* Robinson, 16 Ala. 793; Banton *v.* Campbell, 2 Dana, 421; Darmouth *v.* Kloch, 28 Mich. 163; Williams *v.* Wells, 62 Iowa, 740.

[3] Beitler *r.* Zeigler, 1 Penr. & W. 135; Raynor *v.* Raynor, 94 N. Y. 248; Jackson Co. *v.* Gullatt, 84 Ala. 243.

[4] Walker *v.* Crawford, 70 Ala. 567; Grant *v.* Phœnix M. L. I. Co., 106 U. S. 429; Parsons *v.* Robinson, 122 U. S. 112; Burlington etc. R'y Co. *v.* Simmons, 123 U. S. 52.

[5] Thompkins *v.* Hyatt, 19 N. Y. 535.

closure cannot be final if it neither determines the amount to be paid nor ascertains or describes the property to be sold;[1] nor if it merely declares the amount due, without awarding to plaintiff the only relief to which he is entitled in the suit, to wit, a direction or judgment that the property be sold and the proceeds applied to the satisfaction of the mortgage debt.[2] While the question of costs can hardly be regarded as forming a distinct issue in the case, nor its reservation as necessarily preventing a final determination of the rights of the parties, yet in some states a judgment or decree, otherwise final, reserving this question, is treated as interlocutory.[3]

§ 32 a. **Interlocutory. Decisions of Part only of the Issues.** — Decisions upon demurrers to the pleadings or upon pleas in abatement, and all orders disposing of some of the issues while others remain to be decided,[4] or determining the rights of some of the parties, leaving the rights of others undetermined, constitute examples of interlocutory decrees and judgments of our fourth class.[5]

§ 32 b. **Interlocutory. Orders Looking to Preserving Property Pendente Lite.** — Orders appointing receivers to take charge of property, or to collect the rents and profits thereof during the pendency of the suit,[6] or to pay money into court or to some officer thereof for preservation during the pendency of litigation as to its ownership,[7] are not final judgments.

[1] Railroad Co. *v.* Swasey, 23 Wall. 405.

[2] Crim *v.* Kessing, 89 Cal. 478.

[3] Williams *v.* Field, 2 Wis. 421; 60 Am. Dec. 426; Dickinson *v.* Codwise, 11 Paige, 189; Williamson *v.* Field, 2 Barb. Ch. 281. *Contra*, McFarland *v.* Hall's Heirs, 17 Tex. 676.

[4] Keystone M. & I. Co. *v.* Martin, 132 U. S. 91; Hayes *v.* Caldwell, 5 Gilm. 33; Phelps *v.* Fickes, 63 Ill. 201; Slagle *v.* Rodmer, 58 Ind. 465.

[5] Owens *v.* Mitchell, 33 Tex. 228.

[6] East & W. T. L. Co. *v.* Williams, 71 Tex. 444; Farson *v.* Gorham, 117 Ill. 137; Hottenstein *v.* Conrad, 5 Kan. 249; Eaton & H. R. R. Co. *v.* Varnum, 10 Ohio St. 622; Maysville & L. R. R. Co. *v.* Punnett, 15 B. Mon. 47; Kansas R. M. Co. *v.* A., T., & S. F. R. R. Co., 31 Kan. 90; Fuller *v.* Adams, 12 Ind. 559. *Contra*, Lewis *v.* Campau, 14 Mich. 458; 90 Am. Dec. 245; Taylor *v.* Swett, 40 Mich. 736.

[7] Louisiana Bank *v.* Whitney, 121 U. S. 284.

§ 32 c. **Reversing and Vacating Decrees, Judgments, and Orders.** — Granting a new trial, vacating a judgment, order, or decree on motion, or reversing it on appeal or writ of error, or any other adjudication by which a judgment, order, or decree is set aside, and the cause left open for further proceedings which may and must be prosecuted before the final judgment or decree can be entered, is not a final judgment.[1] Hence, though the highest appellate court of a state may have granted a new trial, or reversed a judgment or decree and remanded the cause for further proceedings in the trial court, no appeal can be taken to the supreme court of the United States until after such proceedings have been taken and have resulted in a final judgment or decree.[2] But if a judgment of reversal contains directions for the entry of judgment in the trial court, so that the latter has nothing to do except to render and enter judgment as directed, the judgment of reversal is a final judgment and reviewable as such.[3]

§ 33. **Appeals Unnecessary not Permitted.** — The policy of the laws of the several states and of the United States is to prevent unnecessary appeals. The appellate courts will not review cases by piecemeal. The interests of litigants require that causes should not be prematurely brought to the higher courts. The errors complained of might be corrected in the court in which they originated; or the party injured by them might, notwithstanding the injury, have final judgment in his favor. If a judgment, interlocutory in its nature, were the subject of appeal, each of such judgments rendered in the case could be brought before the appellate court, and litigants harassed by useless delay and expense and the courts burdened with unnecessary labor.

[1] House *v.* Wright, 22 Ind. 383; Byers *v.* Butterfield, 33 Mo. 376; Smith *v.* Adams, 130 U. S. 167; McCulloch *v.* Dodge, 8 Kan. 476; Lawson *v.* Moore, 44 Ala. 274; In re Studdart, 30 Minn. 553; Houston *v.* Moore, 3 Wheat. 167; Higgins *v.* Brown, 5 Col. 345; Brown *v.* Edgerton, 14 Neb. 453.

[2] Bostwick *v.* Brinkerhoff, 106 U. S. 3; Johnson *v.* Keith, 117 U. S. 199.

[3] Mowes *v.* Fletcher, 114 U. S. 127.

§ 34. **Judgment, when Appealable.** — The general rule recognized by the courts of the United States and by the courts of most, if not of all, the states is, that no judgment or decree will be regarded as final within the meaning of the statutes in reference to appeals, unless all the issues of law and of fact necessary to be determined were determined, and the case completely disposed of, so far as the court had power to dispose of it.[1]

§ 35. **Exceptions.** — But owing to particular circumstances and hardships, the courts have refused to dismiss appeals from some judgments which did not completely dispose of the cases in which they were entered. These judgments determined particular matters in controversy, and were of such a nature that they could be immediately enforced, and by their enforcement could deprive the party against whom they were rendered of all benefits which he might obtain from an appeal at any subsequent stage of the proceedings.[2] To avoid the necessity of being called upon to review such judgments, the superior courts have cautioned the inferior ones, and endeavored to impress upon them the evils resulting from the practice of entering interlocutory judgments capable of being at once enforced against a party, and doing him irretrievable damage before a final judgment can be entered.[3] Prob-

[1] McCollum *v.* Eager, 2 How. 61; Craighead *v.* Wilson, 18 How. 199; Ayres *v.* Carver, 17 How. 594; Crawford *v.* Points, 13 How. 11; Mordecai *v.* Lindsay, 19 How. 200; Montgomery *v.* Anderson, 21 How. 386; Barnard *v.* Gibson, 7 How. 650; Pepper *v.* Dunlap, 5 How. 51; Winn *v.* Jackson, 12 Wheat. 135; The Palmyra, 10 Wheat. 502; Chace *v.* Vasquez, 11 Wheat. 429; Hiriart *v.* Ballon, 9 Pet. 156; Rutherford *v.* Fisher, 4 Dall. 22; Young *v.* Grundy, 6 Cranch, 51.

[2] Merle *v.* Andrews, 4 Tex. 200; Stovall *v.* Banks, 10 Wall. 583.

[3] Barnard *v.* Gibson, 7 How. 650; Forgay *v.* Conrad, 6 How. 201. The case of Martin *v.* Crow, 28 Tex. 614, so far as we are able to understand it, seems to deny the right of appeal even where the judgment is capable of enforcement against the parties to it. The suit was by C. against A. M., M. M., and L. M. Judgment by default was entered against M. M. and L. M., and the cause continued for service against A. M. From this judgment an appeal was taken, but by whom does not appear. In considering the appeal, the court said: "When the whole of the matter in controversy is finally disposed of as to all the parties, then there is a final judgment, and not before, from which an appeal or writ of error can be taken." But as there are intimations in the opinion that the court seemed to be considering the rights of A. M., who was not

ably to avoid special hardships resulting from the failure to give a right of appeal from other than a final judgment or decree, the following have been decided, for the purposes of an appeal, to be final judgments: Orders appointing receivers and directing them to take possession of property;[1] directing that partition be made, and determining the interests of the respective parties to the action;[2] fixing the amount of alimony to be paid *pendente lite*, and directing its immediate payment;[3] removing or refusing to remove a cause to another court for trial.[4]

a party to the judgment, it may be that he was the appellant. If so, the general language of the court does not raise any conflict with the rule of the cases cited above.

[1] Lewis *v.* Campau, 14 Mich. 458; 90 Am. Dec. 245.

[2] Ansley *v.* Robinson, 16 Ala. 793; Banton *v.* Campbell, 2 Dana, 421; Darmouth *v.* Kloch, 28 Mich. 163; Williams *v.* Wells, 62 Iowa, 740.

[3] Daniels *v.* Daniels, 9 Col. 133; Sharon *v.* Sharon, 67 Cal. 185.

[4] McMillan *v.* State, 68 Md. 307; Home L. I. Co. *v.* Dunn, 20 Ohio St. 175; 5 Am. Rep. 642. *Contra*, Vance *v.* Hogue, 35 Tex. 432; Jones *v.* Davenport, 7 Cold. 145; Jackson *v.* Alabama G. S. R. R. Co., 58 Miss. 648.

## CHAPTER II.

### THE ENTRY OF JUDGMENTS.

§ 37. Importance of.
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§ 37. **Importance of.** — The promptings of the most ordinary prudence suggest that whatever, in the affairs of men, has been so involved in doubt and controversy as to require judicial investigation ought, when made certain by a final determination, to be preserved so by some permanent and easily understood memorial. Hence all courts and all tribunals possessing judicial functions are required by the written or unwritten law, and often by both, to reduce their decisions to writing in some book or record kept for that purpose. The requirement is believed to be of universal application.[1] So that if any judgment

[1] Meeker *v.* Van Rensselaer, 15 Wend. 397; Jones *v.* Walker, 5 Yerg. 427; Davidson *v.* Murphy, 13 Conn. 213; Boker *v.* Bronson, 5 Blatchf. 5.

or decree of any court, whether of record or not of record, whether subordinate or appellate, fails to be entered upon its records, the failure is attributable to the negligence or inadvertence of its officers, and not to the countenance and support of the law.

While the entry is not the judgment, its absence tends strongly to indicate that no judgment exists, and in doubtful cases may be sufficient to sustain the issue that whatever has been done has been but preliminary to judgment. Thus a memorandum handed down by an appellate court, of its decision on appeal, is not a judgment, but simply authority to enter one.[1] An entry made by a judge in his calendar is not the judgment in the case. It is intended merely for the guidance of the clerk in entering orders and judgments, and cannot prevent the judge from subsequently signing and the clerk enrolling the final judgment.[2] The entry, though without it the judgment be conceded to exist, may be important in other respects besides that of establishing the terms of the judgment, as where, under the statute of a state, a judgment cannot be docketed so as to constitute a lien until after its actual entry,[3] or where judgments are in certain cases required to be recorded before they can affect innocent purchasers or encumbrancers;[4] for unless the judgment is entered, no copy of it can exist to be filed for record.

§ 38. **Ministerial Act.** — Expressions occasionally find their way into reports and text-books, indicating that the entry is essential to the existence and force of the judgment. These expressions have escaped from their authors when writing of matters of evidence, and applying the general rule that in each case the best testimony which is capable of being produced must be received, to the exclusion of every means of proof less satisfactory and less authentic. The rendition of a judgment is a judicial act;

[1] Knapp *v.* Roche, 82 N. Y. 366.
[2] Traer *v.* Whitman, 56 Iowa, 443.
[3] Rockwood *v.* Davenport, 37 Minn. 533; Eastham *v.* Sallis, 60 Tex. 576.
[4] Witter *v.* Dudley, 42 Ala. 616.

its entry upon the record is merely ministerial.[1] A judgment is not what is entered, but what is ordered and considered.[2] The entry may express more or less than was directed by the court, or it may be neglected altogether; yet in neither of these cases is the judgment of the court any less *its* judgment than though it were accurately entered. In the very nature of things, the act must be perfect before its history can be so; and the imperfection or neglect of its history fails to modify or obliterate the act. That which the court performs judicially, or orders to be performed, is not to be avoided by the action or want of action of the judges or other officers of the court in their ministerial capacity. It is, therefore, not indispensable to the validity of an execution and a sale made thereunder that the judgment should have been actually entered before the writ issued.[3] While its entry of record is not indispensable to a judgment, a judgment is essential to the validity of an entry. The ministerial act of the clerk must be supported by a judicial act pronounced by the court in express terms, or in contemplation of law. The clerk is in some contingencies authorized to enter judgment by default; but in these instances the court, in contemplation of law, pronounces the judgment, though as a matter of fact no action may be taken by the presiding judge. In all other cases the entry of judgment by the clerk must be supported by the previous order or direction of the court, or it will be treated as void.[4] In the case of judgments, they must *first* be entered upon the record before they are admissible as evidence in other actions.[5] The record, if not made up, or if lost or destroyed, should

[1] Estate of Cook, 77 Cal. 220; 11 Am. St. Rep. 267; Schuster *v.* Rader, 13 Col. 329; Estate of Newman, 75 Cal. 213; 7 Am. St. Rep. 146; Matthews *v.* Houghton, 11 Me. 377; Fish *v.* Emerson, 44 N. Y. 376; Crim *v.* Kessing, 89 Cal. 478; Conwell *v.* Kuykendall, 29 Kan. 707.

[2] Davis *v.* Shaver, 1 Phill. (N. C.) 18; 91 Am. Dec. 92.

[3] Los Angeles Co. Bank *v.* Raynor, 61 Cal. 145. So a judgment of conviction will sustain a commitment issued thereon, though it has not yet been formally entered: Ex parte Raye, 63 Cal. 491.

[4] Lee *v.* Carrollton Savings and Loan Association, 58 Md. 301.

[5] Hall *v.* Hudson, 20 Ala. 284.

be perfected or replaced by appropriate proceedings in the court where the judgment was pronounced.

§ 39. **Distinction between Judgments and Decrees.** — In respect to the entry of judgments and of decrees upon the record, and the consequent effect of their want of entry, as affecting their admissibility as evidence in other cases, there seems to be this radical difference: a judgment can speak but by the record; a decree, in the absence of any statute or provision to the contrary, takes effect immediately after being pronounced by the court. Its enrollment adds nothing to its force nor to its competency as evidence.[1] This distinction arose from the differences in the proceedings at law and in equity. It is inherent in the nature of the two systems. Though the code declares in general terms that there shall be but one form of action, and thereby, in a general manner, attempts to abolish the distinctions before existing in the pursuit of legal and of equitable remedies, it has not altogether succeeded. The necessity for the recognition of equitable rights, and for granting equitable relief, continues as before the adoption of the code. The proceedings occasioned by this necessity are substantially as they were under the old system. Among the rules of the old system not abrogated by the new is the one that a decree pronounced by the court and reduced to writing is admissible in evidence, independent of the fact of its enrollment or entry in the judgment-book.[2] But the distinction between a decree and an order for a decree must not be overlooked. "No decree can be said to be entered of record until it is formally drawn out and filed by the clerk. A mere order for a decree, before it is extended in due form and in apt and technical lan-

[1] Bates *v.* Delavan, 5 Paige, 303; Winans *v.* Dunham, 5 Wend. 47; Butler *v.* Lee, 3 Keyes, 73. But in Canada the decree must be entered in the register's book, and all proceedings based thereon, and taken before such entry, are irregular and voidable: Drummond *v.* Anderson, 3 Grant (U. C.) 151.

[2] Lynch *v.* Rome Gas Light Co., 42 Barb. 591.

guage, cannot be held to be a complete record of the judgment of the court."[1]

§ 39 a. **The Time of the Entry of Judgment.** — At the common law, a judgment took effect as of the first day of the term at which it was rendered, in all cases where it might have been then rendered;[2] while in some parts of the United States the reverse rule obtains, and judgments take effect as of the last day of such term.[3] The purpose of these rules is merely to place judgments rendered at the same term upon an equality, where all were rendered in cases which were ready for judgment at the commencement of the term; they do not prescribe or limit the time in which the clerical labor of entering judgment may be performed. Statutes have been enacted specifying the time within which judgments should be entered, either in all cases, or in particular cases enumerated in the statute. Thus in Kentucky, judgments, orders, and decrees were required to be drawn up and recorded by the clerk on the evening of each day.[4] In California, when trial by jury has been had, judgment must be entered by the clerk in conformity with the verdict within twenty-four hours after its rendition.[5] In other instances, statutes have forbidden the entry of judgment until after the lapse of a designated period. A judgment entered before the time allowed by law, or the order of the court, or the agreement of the parties, is irregular, and liable to be vacated on motion;[6] but it is not void.[7] If the statute requires four days to be given between the filing of a decision and the entry of judgment, four full calendar

[1] Thompson *v.* Goulding, 5 Allen, 81; Gilpatrick *v.* Glidden, 82 Me. 201.

[2] Farley *v.* Lea, 4 Dev. & B. 169; 32 Am. Dec. 680; Withers *v.* Carter, 4 Gratt. 407; 50 Am. Dec. 78; Faust *v.* Trice, 8 Jones, 494; Wright *v.* Mills, 4 Hurl. & N. 488.

[3] Bradish *v.* State, 35 Vt. 452; Chase *v.* Gilman, 15 Me. 64; Herring *v.* Polley, 8 Mass. 113; Goodall *v.* Harris, 20 N. H. 363.

[4] Raymond *v.* Smith, 1 Met. (Ky.) 65; 71 Am. Dec. 458.

[5] Cal. Code Civ. Proc., sec. 664.

[6] Marvin *v.* Marvin, 75 N. Y. 240.

[7] Lyons *v.* Cooledge, 80 Ill. 529; In re Newman, 75 Cal. 213; 7 Am. St. Rep. 146; Mitchell *v.* Aten, 37 Kan. 33; 1 Am. St. Rep. 231; Essig *v.* Lower, 120 Ind. 239

days must be allowed, and the rule of computation which excludes the first day but includes the last is not applicable.[1] We shall hereafter show that if a judgment is not entered at the proper time, its entry *nunc pro tunc* will be directed by the court, because it will not permit its judgments to be annulled through the mere failure of its clerk to enter them. It follows from this that a clerk who has failed to enter judgment within the time directed has omitted to perform his duty at the most appropriate time, but that its performance is still due from him, and he should proceed with it, notwithstanding the lapse of the time designated in the statute. When he does enter the judgment it is as valid as if entered in due time;[2] though in the mean time the judge who pronounced it has gone out of office.[3] Unless some statute has given the court power to act judicially in vacation, there is, in contemplation of law, no court except in term time, and a judgment rendered in the interval between two terms is therefore void.[4] The clerk may, however, proceed with his duty to enter judgments in vacation as well as in term time, if the judgments themselves were rendered at a time when the court was authorized to render them.[5] There ought, however, when judgment is entered after the expiration of the term, to be some memorandum in the minutes of the court sufficient to guide the clerk in making his entries, and where such was not the case it was held that a judgment might be stricken out on motion.[6] In Nebraska it has been decided to be improper to render judgment and direct it to be entered when the pleadings in the case had all been lost,[7] on the ground, we presume, that the court ought first to proceed to supply its lost records, so that when judgment should be entered there could be a com-

[1] Marvin *v.* Marvin, 75 N. Y. 240.
[2] Bundy *v.* Maginess, 76 Cal. 532; Waters *v.* Dumas, 75 Cal. 563.
[3] Crim *v.* Kessing, 89 Cal. 478.
[4] *Post*, sec. 121.
[5] Myers *v.* Funk, 51 Iowa, 92; Iliff *v.* Arnott, 31 Kan. 672; County Supervisors *v.* Sullivan, 51 Wis. 115; Sieber *v.* Frink, 7 Col. 148; Lind *v.* Adams, 10 Iowa, 398; 77 Am. Dec. 123.
[6] Montgomery *v.* Murphy, 19 Md. 576; 81 Am. Dec. 652.
[7] Grimison *v.* Russell, 11 Neb. 469.

plete judgment roll, upon which any party feeling himself aggrieved might seek relief by appeal or otherwise.

§ 40. **In Judgment-book.** — The code requires the keeping of a judgment-book by the clerk, in which every judgment must be entered.[1] In no case ought this requirement to be dispensed with. It applies as well where the decision of the judge is made in writing and filed as in any other case.[2] The authority of the clerk to make this formal entry is founded on a judgment already valid, and whose validity is not destroyed by his failure to enter it. A judgment drawn up in the form in which it was intended to be entered, signed by the judge, and filed in the cause, is the judgment of the court at that time and of that term, although execution should not be issued upon it then.[3] The action of the clerk, being non-judicial, may take place at any time afterward. The usual custom, perhaps, is for him to wait for leisure moments to perform this duty. In many cases the record is not completed until after the adjournment of the term. And this practice seems to have prevailed at common law.[4] As the judgment is final before its formal entry in this book, a statute providing that an appeal may be perfected within a specified time from the "rendition" of the judgment certainly commences to run from the time of the drawing up and signing of the judgment, and filing it among the papers in the case.[5] The language used in the opinion of the court in the case of *Genella* v. *Relyea*, 32 Cal. 159, though not necessary to the decision of that case, is worthy of citation, as founded upon reason. It indicates that the time for appeal begins to run though no judgment is filed. "The court announced its judgment and

[1] N. Y. Code, sec. 1236; Cal. Code Civ. Proc., sec. 668.

[2] S. & S. Plank Road Co. *v.* Thatcher, 6 How. Pr. 226.

[3] Casement *v.* Ringgold, 28 Cal. 335; McMillan *v.* Richards, 12 Cal. 467. The omission of the clerk to sign a decree is at most a mere irregularity which does not vitiate the judgment: Hotchkiss *v.* Cutting, 14 Minn. 542; Jorgensen *v.* Griffin, 14 Minn. 466.

[4] Osborne *v.* Toomer, 6 Jones, 440.

[5] Gray *v.* Palmer, 28 Cal. 416; Genella *v.* Relyea, 32 Cal. 159; Kehoe *v.* Blethen, 10 Nev. 445.

the order for judgment was entered in the minutes of the court on the 15th of August, 1865. The judgment was therefore rendered and the time for taking an appeal commenced to run on that day."

§ 41. **Use of Improper Book.** — If, as in California,[1] the clerk is required, in addition to the judgment-book, to keep a "register of actions," and he, neglecting to keep the first named, copies judgments into the latter, they are not therefore invalid. The substantial purpose of the statute is accomplished although the two books are united. No harm results to any one from this union;[2] but, independent of the considerations named, the judgments should be sustained. If, as the authorities state, judgments are valid when not entered in any book, they surely ought to be equally valid if entered in some record of the court, though not in the one designed for that purpose.[3]

§ 42. **On Verdicts.** — The Code of Civil Procedure in California[4] requires the clerk to enter judgment in conformity to the verdict within twenty-four hours after the rendition of the verdict, unless the court orders the case reserved for further consideration, or grants a stay of proceedings. If there is no doubt as to what judgment is proper, the better practice is to enter it at once. The judgment may as well be set aside as the verdict. Therefore such proceedings as may be appropriate to securing a new trial, or any other right of the losing party, can be prosecuted as advantageously upon granting a stay of proceedings upon the judgment as upon the verdict. The immediate entering of judgment authorizes the making up of the judgment roll, and thus secures a lien on the judgment debtor's real estate. To this security he is at once justly entitled. If the court delays in granting it to

[1] Cal. Code Civ. Proc., sec. 1052.
[2] Jorgensen *v.* Griffin, 14 Minn. 464.
[3] Thompson *v.* Bickford, 19 Minn. 17; Bond *v.* Citizens' N. B., 65 Md. 498.
[4] Cal. Code Civ. Proc., sec. 664.

him, he may during the stay of proceedings be deprived of the fruits of his litigation.[1]

§ 43. **Joint Parties.**—At common law, in a joint action, whether upon a joint or a joint and several contract, or upon several distinct contracts, the general rule was, that there could be no judgment except for or against all of the defendants. To this rule the exceptions were: 1. In cases where one or more of the defendants, admitting the contract, established a discharge therefrom, as by bankruptcy; 2. Where some one of the defendants pleaded and proved that he was incapable of contracting when the alleged contract was made, from some disability, as infancy. So unyielding was the rule, that when one of the defendants suffered a default or confessed the action, no judgment could be given against him, if his co-defendant succeeded in maintaining some defense affecting the entire contract.[2] Codes of procedure, adopted in several of the states,[3] have abolished this rule by enacting that judgment may be given for or against "one or more of several plaintiffs, and for or against one or more of several defendants"; and "that in an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others whenever a several judgment is proper." Under these sections, of two persons sued jointly, one may obtain a judgment against the plaintiff, and the other be subjected to a judgment in the plaintiff's favor.[4] And in general, a several judgment may be properly rendered whenever a several action can be sustained.[5] In California, in an action against two or more, a judgment may be entered against the defendants in court, excluding those

[1] Hutchinson *v.* Bours, 13 Cal. 50.

[2] Taylor *v.* Beck, 3 Rand. 316; Cole *v.* Pennel, 2 Rand. 44; Steptoe *v.* Reed, 19 Gratt. 1; Woodward *v.* Newhall, 1 Pick. 500; Minor *v.* Mechanics' Bank, 1 Pet. 46; Baber *v.* Cook, 11 Leigh, 606; Rolfe *v.* Davis, 9 Leigh, 30.

[3] Cal. Code Civ. Proc., secs. 578, 579; N. Y. Code, 1204, 1205; Wis. Code, 41; Ky. Code, 370.

[4] Rowe *v.* Chandler, 1 Cal. 167; Parker *v.* Jackson, 16 Barb. 33.

[5] Harrington *v.* Higham, 15 Barb. 524; Van Ness *v.* Corkins, 12 Wis. 186; Crandall *v.* Beach, 7 How. Pr. 271.

not appearing and upon whom summons has not been served, though the contract appears to be jointly binding on all of the defendants.[1] The practice is otherwise in New York; and that sanctioned by the California cases is spoken of in terms of strong, and as it seems to us merited, condemnation. The plaintiff cannot, under the code, deprive the defendant of the advantage of having his joint co-contractors united with him in the action, and their property, as well as his, made liable for the judgment. Still less ought the plaintiff to be tolerated in making all the co-contractors parties, for the purpose of avoiding a plea in abatement; and afterwards, without leave of the court, or notice to the defendant served, dropping the unserved defendants from the judgment.[2] Every judgment against any joint defendant is irregular until the other is out of the action, and the issues against him disposed of. Until then he has the right to appear at every trial of the issues.[3] One of the joint defendants sued on a joint liability having answered, no judgment can be taken against those in default until the issues formed by the answer are disposed of.[4]

§ 44. **Joint Contractors.**—Upon serving summons in a joint action, upon one or more defendants jointly indebted upon a contract, the plaintiff may, under the code, proceed against the defendants served, unless the court directs otherwise; and if he recovers, the judgment may be entered against all the defendants shown to be thus jointly indebted, so far only that it may be enforced against the joint property of all, and the separate property of those served.[5] This provision is not applicable to a proceeding to foreclose a mortgage, and obtain a decree for the sale of the premises mortgaged. The fact that two persons have joined in the mortgage does not create a presump-

[1] Ingraham *v.* Gildemeester, 2 Cal. 88; Hirschfield *v.* Franklin, 6 Cal. 607.
[2] Niles *v.* Battershall, 27 How. Pr. 381; Sager *v.* Nichols, 1 Daly, 1; Fowler *v.* Kennedy, 2 Abb. Pr. 347.
[3] Brown *v.* Richardson, 4 Robt. 603.
[4] Catlin *v.* Latson, 4 Abb. Pr. 248.
[5] Cal. Code Civ. Proc., sec. 413; N. Y. Code, secs. 1932–1935.

tion that the property therein described is owned by them jointly.[1]

§ 45. **Construction.** — If no date appeared upon a judgment, it was presumed, at common law, to be entered on the first day of the term at which it was rendered. The rule is different in some of the United States, as in Maine, Massachusetts, and New Hampshire, where the rendition is supposed to have occurred at the last day of the term, unless the contrary appears.[2] Including in a judgment one who, though named as a party to the suit, never appeared therein, and as to whom the process was returned not found, has been regarded as a mere clerical error, neither affecting the party thus included, nor furnishing any ground for a reversal in the appellate court.[3] On the other hand, an appeal has been esteemed the appropriate remedy for the correction of a similar error.[4] This is doubtless the better opinion. And in those states where the presumptions in favor of the jurisdiction of courts of record are liberally indulged and applied, a party to a suit who considered the unauthorized addition of his name in the entry of the judgment as a clerical error not requiring attention, and who failed to correct it in some manner, would be in imminent peril of such proceedings as should leave him to regret his misapprehension and neglect. The entry, "This day came the parties by their attorneys, and the plaintiff enters a *retraxit*," will not be construed as importing that the plaintiff did not come in person as well as by his attorney. On the other hand, it will be presumed, in support of the judgment, that as the attorney was incompetent to enter a *retraxit*, the plaintiff personally made the entry.[5] If the entry of a judgment is so obscure as not to express the final determination with sufficient accuracy, reference may be

[1] Bowen *v.* May, 12 Cal. 348.

[2] Chase *v.* Gilman, 15 Me. 64; Herring *v.* Polley, 8 Mass. 113; Goodall *v.* Harris, 20 N. H. 363.

[3] Savage *v.* Walshe, 26 Ala. 619.

[4] Joyce *v.* O'Toole, 6 Bush, 31; Ruby *v.* Grace, 2 Duvall, 540.

[5] Thomason *v.* Odum, 31 Ala. 108; 68 Am. Dec. 159; Conk *v.* Lowther, 1 Ld. Raym. 597.

had to the pleadings and to the entire record. If, with the light thrown upon it by them, its obscurity is dispelled, and its intended signification made apparent, it will be upheld and carried into effect.[1] In case of doubt regarding the signification of a judgment, or of any part thereof, the whole record may be examined for the purpose of removing the doubt. One part of the judgment may be modified or explained by another part; and uncertainties in the judgment may become certain under the light cast upon them by the pleadings or other parts of the record.[2] Though the judgment purports to be against the defendants, without naming them, only one of them will be bound, if it appears from the context that only he was meant,[3] or from the return of the service of process that only he was brought within the jurisdiction of the court.[4] On the other hand, though the word "defendant" is written in the body of the judgment, it will be construed as referring to and including all the defendants named in the caption.[5]

§ 46. **Form.** — At common law, the judgment or sentence of law commenced with "it is considered by the court that plaintiff or defendant recover," etc. Those words were considered peculiarly appropriate, as involving and expressing the idea that what was about to be ordered was not the sentence of the judges, but of the law. They came to be inseparably associated in the minds of lawyers with the entry of a judgment. The chief stress was laid upon the word "considered." In Arkansas, the insertion of "ordered and resolved" in the place ordi-

[1] Fowler *v.* Doyle, 16 Iowa, 534; Finnagan *v.* Manchester, 12 Iowa, 521; Beers *v.* Shannon, 73 N. Y. 292; Foot *v.* Glover, 4 Blackf. 313; Bell *v.* Massey, 14 La. Ann. 831; Peniston *v.* Somers, 15 La. Ann. 679.

[2] Clay *v.* Hildebrand, 34 Kan. 694; Fleenor *v.* Driskill, 97 Ind. 27; Hoffertbert *v.* Klinkhardt, 58 Ill. 450; Walker *v.* Page, 21 Gratt. 636; Flack *v.* Andrews, 86 Ala. 395.

[3] Barnes *v.* Michigan Air L. R'y Co., 54 Mich. 243.

[4] Malaney *v.* Hughes, 50 N. J. L. 546; Clark *v.* Finnell, 16 B. Mon. 329; Boyd *v.* Baynham, 5 Humph. 380; 42 Am. Dec. 438; Neal *v.* Singleton, 26 Ark. 491; Winchester *v.* Beardin, 10 Humph. 247; 51 Am. Dec. 702.

[5] Myers *v.* Hammons, 6 Baxt. 61.

narily occupied by "considered" was held to make the entry a nullity.[1] No judgment, according to the view then taken, had been entered. No objection was made to the words as ambiguous, or as in any way failing to designate the "sentence" or final determination of the court. But the words used, it was thought, did not import that the law had acted or spoken in the matter, and the case was sent back to the subordinate court, to await the time when the law should speak in stereotyped language. This view was hypercritical in the extreme. No authority in support of it was cited, except the general statement in Blackstone's Commentaries, that the language of a judgment is not that "it is resolved or decreed," but that "it is considered." Some years later the same court came to consider a judgment commencing with "it is therefore ordered, adjudged, and decreed."[2] The former decision was left unchanged, with an intimation that it was probably correct. But the words "ordered, adjudged, and decreed" were said to be, when united, equivalent to "considered," and the judgment was sustained.

§ 47. **Form.** — Whatever may have been requisite formerly, it is evident that the sufficiency of the writing claimed to be a judgment must, at least under the code, be tested by its substance rather than by its form. If it corresponds with the definition of a judgment as established by the code; if it appears to have been intended by some competent tribunal as the determination of the rights of the parties to an action, and shows in intelligible language the relief granted,—its claim to confidence will not be lessened by a want of technical form, nor by the absence of language commonly deemed especially appropriate to formal judicial records.[3] The entry of a judg-

[1] Baker *v.* State, 3 Ark. 491.

[2] Ware *v.* Pennington, 15 Ark. 226.

[3] Church *v.* Crossman, 41 Iowa, 373; Lewis *v.* Watrus, 7 Neb. 477; McNamara *v.* Cabon, 21 Neb. 589; Potter *v.* Eaton, 26 Wis. 382; Kase *v.* Best, 15 Pa. St. 101; 53 Am. Dec. 573; Elliott *v.* Jordan, 7 Baxt. 376; Bank of Old Dominion *v.* McVeigh, 32 Gratt. 530; Clark *v.* Melton, 19 S. C. 498; Little P. C. M. Co. *v.* Little C. C. M. Co., 11 Col. 223; 7 Am. St. Rep. 226; Terry *v.* Berry, 13 Nev. 514.

ment, like every other composition, should be comprised of those words which will express the idea intended to be conveyed, with the utmost accuracy. It should also be a model of brevity, and should contain no unnecessary directions. The forms in use at common law answer these requirements so well, that little or nothing can be gained by departing from them. At law, it is not necessary to state in a judgment any of the precedent facts or proceedings on which it is based;[1] and this rule applies under the codes, whether the relief granted is legal or equitable.[2] Wherever the code renders the insertion of matters formerly required in a judgment or decree unnecessary, the practice should conform to the law now in force, rather than to that which is abolished. For instance, judgments foreclosing mortgages should follow the directions of the code of procedure in the state wherein the judgment is entered,[3] in preference to the old forms of chancery practice. They should contain only a statement of the amount due to the plaintiff, a designation of the defendants liable personally, and a direction that the premises, or so much thereof as shall be necessary, be sold according to law, and the proceeds applied to the payment of the judgment and costs. The copying into the decree of the directions of the statute adds nothing to the clearness or force of these directions. All that part providing for the report of the sheriff, the confirmation of the sale, who may become purchasers, and their rights pending the time for redemption, the execution of a conveyance if no redemption be made, the delivery of possession, the docketing of the judgment for any deficiency remaining after sale, accomplishes no better purpose than to encumber the record.[4]

§ 48. **Use of $.**—In actions to enforce the payment of taxes, the insertion of numerals without any mark to designate what they were intended to represent has in

[1] Hamilton *v.* Ward, 4 Tex. 356.
[2] Judge *v.* Booge, 47 Mo. 544.
[3] Cal. Code Civ. Proc., sec. 726.
[4] Leviston *v.* Swan, 33 Cal. 480.

at least two states[1] been held to leave the judgment fatally defective. A similar decision appears in the reports of the supreme court of the United States; but it was made in a case where that court, as stated in its opinion, considered itself bound by the decisions of the Illinois courts. Nor do the courts of Illinois confine this principle of decision to judgments for taxes. In the case of *Carpenter* v. *Sherfy*, 71 Ill. 427, the plaintiffs, in attempting to deraign title to certain lands under an execution sale against their former owner, offered in evidence a judgment "for four hundred and sixty-one and $\frac{53}{100}$ damages." The court said: "Whether this amount is cents, mills, or what, we are left entirely to conjecture. We have no right to indulge in presumptions as to what was found by the court; we must take the record as it reads. A judgment should be for a certain and definite sum of money. This judgment is not for any sum of money, and can only be regarded as a nullity."[2] On the other hand, the highest court in another state has determined that a verdict and judgment are presumed to be for the things or the denomination of currency sued for, rather than for something else, and that a judgment for "525," upon a complaint claiming "$525," must be construed as being for the same denomination of money named in the complaint, and therefore not void for uncertainty;[3] and this view seems to be supported by the rule that a judgment must be construed, in case of obscurity, with the aid of the pleadings and of the entire record. In Minnesota, while a judgment for taxes in numerals only, with nothing to show what they represent, is void for uncertainty, yet if there is a line or decimal-mark separating the figures, those on the left of it will be understood to denote dollars, and those

[1] Lane *v.* Bommelman, 21 Ill. 143; Lawrence *v.* Fast, 20 Ill. 338; 71 Am. Dec. 274; Pittsburg etc. R. R. Co. *v.* Chicago, 53 Ill. 80; Tidd *v.* Rines, 26 Minn. 201. A judgment in the United States should be for dollars and cents, and not for francs, or any other foreign currency: Erlanger *v.* Avegno, 24 La. Ann. 77.

[2] To the like effect, Hopper *v.* Lucas, 86 Ind. 43.

[3] Carr *v.* Anderson, 24 Miss. 183.

on the right cents, and the judgment will therefore be treated as certain and valid.[1]

§ 48 a. **A Judgment, Expressed in Figures** as to its amount, these figures being in connection with a dollar-mark, was objected to on the ground that the statute required judicial records to be written in the English language; but the court was not disposed to hold that the defect was of a character to render the judgment absolutely void and of no avail in a collateral proceeding.[2]

§ 49. **Filling Blanks.**—A court ordered judgment to be entered upon a promissory note, directing the clerk to compute the amount due. He made the entry, leaving blanks for the amounts. Fourteen months afterwards, he filled the blanks by inserting the proper sums. This it was decided might be such an irregularity as could be reached by a writ of error, but it was not available against the judgment in a collateral action.[3] There may be instances in which the leaving of unfilled blanks is not fatal to the judgment; but this must,[4] we apprehend, be upon the ground that there is sufficient evidence before the court in which the judgment is called in question to show that it was pronounced as a final judgment, and is entitled to credit as such, though not yet properly entered. So long as there are any blanks which should be filled by inserting amounts, we think the better view is, that there is no entry of judgment as to an amount which is not so inserted; and that the omission in the judgment-book cannot be supplied by docket or other entries which should themselves be based upon the judgment entry.[5]

§ 50. **Sufficiency of Entries — General Tests of.** — It now remains in this chapter to note some of the decisions

[1] Gutswiller *v.* Crowe, 32 Minn. 70.

[2] Fullerton *v.* Kelliher, 48 Mo. 542. See sec. 50 b.

[3] Lind *v.* Adams, 10 Iowa, 398; 77 Am. Dec. 123.

[4] Gray's Heirs *v.* Coulter, 4 Pa. St. 188; Ulshafer *v.* Stewart, 71 Pa. St. 170.

[5] Case *v.* Plato, 54 Iowa, 64; Noyes *v.* Newmarch, 1 Allen, 51; Lea *v.* Yeates, 40 Ga. 56.

in which the sufficiency of various entries of judgments has been questioned and determined, and the general principles which may be evolved therefrom. The cases are not altogether consistent. This arises, perhaps, from the fact that some minds are deeply impressed with the importance of matters of form, and actuated by the dread of encouraging a loose and unlawyer-like practice; while others, paying little regard to technical considerations, are inclined to recognize and enforce that which, though confessedly informal, is capable of being readily understood and carried into effect. I think, however, that from the cases this general statement may be safely made: That whatever appears upon its face to be intended as the entry of a judgment will be regarded as sufficiently formal if it shows,—1. The relief granted; and 2. That the grant was made by the court in whose records the entry is written.[1] In specifying the relief granted, the parties against and to whom it is given must, of course, be sufficiently identified. According to the supreme court of Alabama, "a judgment should show the plaintiff who recovers, the defendant against whom the recovery is had, and the special thing or amount of money recovered."[2]

§ 50 a. **The Designation of the Parties for and against Whom** the judgment is given must in all cases be sufficient to enable the clerk to know at whose instance to issue execution, and against whose property it may be properly enforced. Hence a judgment for or against the captain and master of the steamer Mollie Hamilton,[3] or the legatees of Philip Joseph,[4] or against a defaulting witness by his proper name, but not stating in whose favor,[5] is insufficient, if the whole record or judgment roll does not clearly disclose the parties for and against whom

[1] Flack *v.* Andrews, 86 Ala. 395.
[2] Spence *v.* Simmons, 16 Ala. 828.
[3] Steamer Mollie Hamilton *v.* Paschal, 9 Heisk. 203.
[4] Joseph's Adm'r *v.* His Legatees, 5 Ala. 280; Turner *v.* Dupree's Adm'r, 19 Ala. 198; but a judgment in favor of the heirs of a designated person has been sustained: Shackleford *v.* Fountain, 1 T. B. Mon. 252; 15 Am. Dec. 115; Parsons *v.* Spencer, 83 Ky. 305.
[5] Spence *v.* Simmons, 16 Ala. 828.

the judgment is given. On the other hand, it is equally well settled that the names of the parties need not be stated in the body of the judgment.[1] The name of the firm may be given, instead of the names of its individual members, or the parties may be designated generally as the plaintiffs or the defendants, provided a reference to the caption, or to the pleadings, process, and proceedings in the action, makes certain the names of the parties thus designated;[2] and although a judgment purports to be against the defendants generally, its effect will be limited to one only, if from the whole record it is manifest that he, and he only, was intended.[3] But in Louisiana a judgment against certain named persons and others, as defendants, does not create a judicial mortgage or lien against the lands of any defendant whose name is not stated in the judgment entry, although it can be ascertained by examining the pleadings.[4] As heretofore suggested, every judgment may be construed and aided by the entire record. A mistake in the name of a party is therefore rarely of serious consequence. If his name is incorrectly spelled, the principles of *idem sonams* may render the error immaterial;[5] if his initials are reversed, or otherwise misstated in the entry, the mistake may be cured by reference to other parts of the record. If he sued or was sued by a wrong or fictitious name, or by some designation which included a part only of his name, and was personally served with process, and, failing to urge the misnomer in any way, judgment was entered for or against him, either by his correct name[6] or by such mistaken, fictitious, or imperfect name, it is valid and

[1] Aldrich *v.* Maitland, 4 Mich. 205; Smith *v.* Chenault, 48 Tex. 455; Goofgion *v.* Gilreath, 32 S. C. 388.

[2] Wilson *v.* Nance, 11 Humph. 189; Little *v.* Birdwell, 27 Tex. 688; Collins *v.* Hyslop, 11 Ala. 508; Hays *v.* Yarborough, 21 Tex. 487; McCartney *v.* Kittrell, 55 Miss. 253; Smith *v.* Chenault, 48 Tex. 455.

[3] Finnagan *v.* Manchester, 12 Iowa, 521; Holcomb *v.* Tift, 54 Mich. 647; Banning *v.* Sabin, 41 Minn. 477; *post*, sec. 155, and *ante*, sec. 45.

[4] Ford *v.* Tilden, 7 La. Ann. 533.

[5] Rowe *v.* Palmer, 29 Kan. 337; Mallory *v.* Riggs, 76 Iowa, 748.

[6] Kronski *v.* Missouri Pac. R'y, 77 Mo. 362; McGaughey *v.* Woods, 106 Ind. 380.

enforceable.[1] While the parties to a judgment may, perhaps, be described in terms, the meaning of which cannot be ascertained from the record, as where they are designated as the heirs of J. F.,[2] yet this practice is not worthy of encouragement. There must be no question that the judgment is for and against some person or persons; and if against certain persons *or* their representatives or assigns, it is void for uncertainty.[3]

§ 50 b. **The Amount, in Case** the judgment is for money, must be designated. It has sometimes been adjudged that the amount cannot be expressed in figures, even when preceded by a dollar-mark to show what the figures were intended to express.[4] The supreme court of Illinois has also said "that amounts should not, in the judgment of a court, be entered in figures, but in all cases by letters. There is no safety in using figures for such purpose. It is not to be tolerated."[5] We concede that the entry in figures of the amount of a judgment is unsafe, and ought not to be encouraged. We nevertheless believe that judgments so entered would not be adjudged void in the majority of the states.[6] The amount must in all cases be certain. Thus judgment for a specified sum, subject to a credit "for one hogshead of tobacco delivered in the year 1799," without ascertaining the value of the tobacco, is fatally indefinite and uncertain.[7] The final judgment ought to designate the precise amount recovered, and not

[1] Vogel *v.* Brown Township, 112 Ind. 299; 2 Am. St. Rep. 187; Newcomb *v.* Peck, 17 Vt. 302; 44 Am. Dec. 340; Root *v.* Fellowes, 6 Cush. 29; First Nat. Bank *v.* Jaggers, 31 Md. 38; 100 Am. Dec. 53; Petterson *v.* Litta, 74 Iowa, 223; Lindsey *v.* Delano, 78 Iowa, 350; Hoffield *v.* Newton Board of Ed., 33 Kan. 644. Where, however, summons is served by publication against defendant by her maiden name, and judgment entered in that name, it does not affect her: Freeman *v.* Hawkins, 77 Tex. 498; 19 Am. St. Rep. 769; and perhaps a like result follows the incorrect publication of plaintiff's name: Ex parte Cheatham, 6 Ark. 531; 44 Am. Dec. 525.

[2] Shackleford *v.* Fountain, 1 T. B. Mon. 252; 15 Am. Dec. 115; Parsons *v.* Spencer, 83 Ky. 305.

[3] Miller *v.* Peters, 25 Ohio St. 270.

[4] Smith *v.* Miller, 8 N. J. L. 175; 14 Am. Dec. 418.

[5] Linder *v.* Monroe, 33 Ill. 390.

[6] See sec. 48 a.

[7] Early *v.* Moore, 4 Munf. 262. See also Berry *v.* Anderson, 2 How. (Miss.) 652.

leave it to be determined by a subsequent computation.[1] But if there is a verdict for a definite sum, judgment thereon for the "said sum of —— dollars, assessed as aforesaid," is sufficiently explicit.[2] It is not fatal to a judgment that a computation is necessary to ascertain the amount of the recovery if it furnishes the *data* for such computation,[3] as where it is for a sum designated, with lawful interest from a specified date.[4]

§ 50 c. **The Property** which is the subject of a judgment or decree must also be described with sufficient certainty to leave its identity free from doubt;[5] but the bill or complaint may be referred to in the judgment, for the purposes of description.[6] The judgment may be either for the possession or the sale of real or personal property, and while it is being executed, or afterwards, a question may arise whether its descriptive words are sufficient to support a sale made by virtue of its authorization, or to justify the execution of a writ of possession based upon it. So far as any general rule can be formulated upon this subject, we apprehend it is this: That a judgment may be aided by the pleadings and other parts of the record, and if the description obtainable from it and them would be sufficient if found in a conveyance to divest the title of the grantor, it will be sufficient to sustain sales made or possession taken under the judgment,[7] and otherwise, that the judgment and all proceedings

[1] Nichols *v.* Stewart, 21 Ill. 106; Smith *v.* Trimble, 27 Ill. 152; Anderson *v.* Reed, 11 Iowa, 177; Landerman *v.* McKinson, 5 J. J. Marsh. 234; Mudd *v.* Rogers, 10 La. Ann. 648.

[2] Ellis *v.* Dunn, 3 Ala. 632; Dyer *v.* Hatch, 1 Ark. 339.

[3] Guild *v.* Hall, 91 Ill. 223; Dinsmore *v.* Austill, Minor, 89; Ladnier *v.* Ladnier, 64 Miss. 368; Stokes *v.* Sanborn, 45 N. H. 274.

[4] Wilbur *v.* Abbot, 58 N. H. 272; Morrison *v.* Smith, 130 Ill. 304.

[5] Gayle *v.* Singleton, 1 Stew. 566; Hurt *v.* Moore, 19 Tex. 269; Jones *v.* Minogue, 29 Ark. 637; Tribble *v.* Davis, 3 J. J. Marsh. 633; McManus *v.* Stevens, 10 La. Ann. 177; Shepherd *v.* Pepper, 133 U. S. 626.

[6] Jones *v.* Belt, 2 Gill, 106; Foster *v.* Bowman, 55 Iowa, 237.

[7] Coleman *v.* Reel, 75 Iowa, 304; Posey *v.* Green, 78 Ky. 162; Miller *v.* Indianapolis, 123 Ind. 796; Wright *v.* Ware, 50 Ala. 549; Bloom *v.* Burdick, 1 Hill, 130; 37 Am. Dec. 299; McWilliams *v.* Walthall, 65 Ga. 109; De Sepulveda *v.* Baugh, 74 Cal. 468; 5 Am. St. Rep. 455.

under it must be treated as void.[1] In California, after great deliberation, the conclusion was reached and announced, that the description of land in a judgment must be perfect in itself, and cannot be aided by a reference in the judgment to any paper or record not constituting a part of the judgment roll in the case in which the judgment was rendered; and judgments were treated as void which directed the sale of land, and referred for purposes of description to certain deeds, the dates and places of record of which were specified, or to a final judgment in partition making an allotment of the land in controversy.[2] These decisions were ultimately overruled, as they deserved to be.[3] If the description referred to is itself uncertain, it cannot aid the judgment, as where a writ is directed to issue to restore to plaintiff possession of the lands, or so much thereof as are not farther south than the boundary line described in the verdict, and the verdict merely designates such line as being seven and nine feet south of a certain hedge.[4]

§ 50 d. **A Judgment of Conviction** may be said to consist of two parts, to wit: 1. The facts judicially ascertained, together with the manner of ascertaining them, entered of record; 2. The recorded declaration of the court pronouncing the legal consequences of the facts thus judicially ascertained. Both of these parts are equally necessary in the entry of a judgment of conviction. "In the first part it is usual and proper to set forth in the minutes of the court the title and number of the case, the calling of the case for trial, the appearance of the parties, the plea of the defendant, and if 'not guilty' the selection, impaneling, and swearing of the

[1] Hearne *v.* Erhard, 33 Tex. 60; Keith *v.* Hayden, 26 Minn. 212.

[2] Crosby *v.* Dowd, 61 Cal. 557; Hill *v.* Ware, 66 Cal. 130.

[3] De Sepulveda *v.* Baugh, 74 Cal. 468; 5 Am. St. Rep. 455. But a description of a tract of land, "except such portions as have heretofore been laid out in town lots by James Roach, and have been sold and conveyed prior to the execution of the mortgage herein," has been adjudged fatally defective: Bowen *v.* Wickersham, 124 Ind. 404; 19 Am. St. Rep. 106.

[4] Robertson *v.* Drane, 100 Mo. 273.

jury, the submission of the evidence, the charge of the court, the return of the verdict, and the finding of the jury. In the second part it should be declared upon the record, in connection with the verdict, in the event of a conviction, that it is considered by the court that the defendant is adjudged to be guilty of the offense as found by the jury, and that the defendant be punished as it has been determined by the jury, — in cases where they have the right to determine the amount, or the duration and place of punishment, — setting forth particularly the amount, or the duration and place of punishment, in accordance with the nature and terms of the punishment prescribed in the verdict."[1]

§ 50 e. **The Signature of the Judge** to the judgment or the record in which the judgments are entered is sometimes required by statute; and in some states its omission has been held fatal,[2] either as making the judgment void, or as presumptive evidence that the alleged judgment had never received judicial sanction. More frequently, however, statutory requirements of this character have been adjudged to be directory merely, and the absence of the judge's signature to in no way impair the effect of the judgment,[3] whether it is legal or equitable in character.

§ 51. **Sufficient Entries, Examples of.** — "I give judgment." These words, if the parties are made certain and the amount ascertained by other parts of the judgment, are as effective as: "It is considered that plaintiff recover," etc.[4] "Whereupon the court orders that plaintiff pay the

[1] Mayfield *v.* State, 40 Tex. 290; Roberts *v.* State, 3 Tex. App. 47. See *ante*, sec. 21 a.

[2] Saloy *v.* Collins, 30 La. Ann. 63; State *v.* Jumel, 30 La. Ann. 421; Raymond *v.* Smith, 1 Met. (Ky.) 65; 71 Am. Dec. 458; Hatch *v.* Arnault, 3 La. Ann. 482; Galbraith *v.* Sidener, 28 Ind. 142; Ferguson *v.* Chastant, 35 La. Ann. 485.

[3] Crim *v.* Kessing, 89 Cal. 478; Baker *v.* Baker, 51 Wis. 538; Traer *v.* Whitman, 56 Iowa, 443; Clapp *v.* Hawley, 97 N. Y. 610; Keener *v.* Goodson, 89 N. C. 273; Gunn *v.* Tackett, 67 Ga. 725; French *v.* Pease, 10 Kan. 51; Fontaine *v.* Hudson, 93 Mo. 62; 3 Am. St. Rep. 515; Rollins *v.* Henry, 78 N. C. 342; Cannon *v.* Hemphill, 7 Tex. 184; Cathcart *v.* Peck, 11 Minn. 45; Childs *v.* McChesney, 20 Iowa, 431; 89 Am. Dec. 545.

[4] Deadrick *v.* Harrington, Hemp. 50.

costs of suit, and that execution issue therefor," in a record showing the trial by a jury and a verdict for the defendants, though not in technical language, is sufficient to constitute a valid judgment.[1] "We should not hesitate to enforce a judgment because 'decreed' or 'resolved' was used instead of 'considered.'"[2] "No judgment will be reversed for the use of inappropriate or untechnical words."[3] "No particular form is required in the proceedings of the court, to render their order a judgment. It is sufficient if it is final, and the party may be injured."[4] "A judgment, in addition to the ordinary circumstances of time and place, should exhibit the parties, the matters in dispute, and the result, but the form is immaterial."[5] The following have been determined to be sufficient entries of judgments: "I hereby render judgment against plaintiff for costs herein. Judgment rendered against plaintiff for costs."[6] "After hearing the proof, it is the opinion of the court that the defendant, Anton Cabon, is indebted to the plaintiff in the sum of $100. It is therefore considered and adjudged by me that Anton Cabon pay to the plaintiff, McNamara and Duncan, the sum of $100, with interest from December 20, 1883, and costs of suit, taxed at $3.15."[7] "Whereupon the court orders that plaintiff pay the costs of suit, and that execution issue therefor."[8] "Therefore it is considered and adjudged by the court that the plaintiff in this action have judgment against the defendants for the sum of $226.45 for his said damages on his said action, and the sum of $35.55 for his costs and disbursements, and that he have execution therefor."[9] "Now, on motion of plaintiffs' attorneys it is adjudged that plaintiffs have judgment herein for the sum of $476, and one cent damages, and for their costs,

[1] Huntington *v.* Blakeney, 1 Wash. 129.
[2] Taylor *v.* Runyan, 3 Clarke, 474.
[3] Minkhart *v.* Hankler, 19 Ill. 47.
[4] Wells *v.* Hogan, Breese, 337; Johnson *v.* Gillett, 52 Ill. 360.
[5] Ordinary *v.* McClure, 1 Bail. 7.
[6] Marsh *v.* Snyder, 14 Neb. 8.
[7] McNamara *v.* Cabon, 21 Neb. 589; Black *v.* Cabon, 24 Neb. 248.
[8] Huntington *v.* Blakeney, 1 Wash. 111.
[9] Potter *v.* Eaton, 26 Wis. 382.

$126.34, amounting in all to $602.35," preceded by a marginal entry of the names of the parties, and of the trial before a jury and of their verdict.[1] "There being no issuable plea filed in this case on oath, judgment is rendered by the court for two hundred and ninety-seven dollars and ninety-nine cents principal, with the sum of ninety dollars and thirty cents for interest to date," the court being of the opinion that the failure to state in whose favor the judgment was was immaterial, because it appeared to be entered on plaintiff's declaration, on the ground that no sufficient answer had been made thereto.[2] "There being no issuable defense filed, ordered that the plaintiffs have leave to enter up judgment against the defendants."[3] Judgment by consent in favor of the plaintiff for ten thousand seven hundred and sixty dollars, the debt in the declaration mentioned, with interest thereon from the first day of January, 1866, till paid, and costs. Execution to be stayed for ninety days."[4] "Therefore plaintiff for costs," accompanied by the statement of the justice who entered it, that it appeared to him that he did not have jurisdiction of the subject-matter.[5]

§ 52. **Insufficient Entries, Examples of.**—The entry must not only indicate what adjudication took place, but should also appear to have been intended as the entry of judgment, and not as a mere memorandum by the aid of which the formal record was to be constructed.[6] "June 14, 1838, judgment sec. reg. for want of plea. January 9, 1839, sum ascertained at $155.07. Interest from June 14, 1838." This writing, being offered as evidence of a judgment, was rejected on the grounds that there was nothing to show by whom judgment was rendered, or against whom, nor for what amount, if in fact any judgment had

[1] Flack *v.* Andrews, 86 Ala. 395.
[2] Adams *v.* Walker, 59 Ga. 506.
[3] Tift *v.* Keaton, 78 Ga. 235.
[4] Bank of Old Dominion *v.* McVeigh, 32 Gratt. 530.
[5] Kase *v.* Best, 15 Pa. St. 101; 53 Am. Dec. 573.
[6] Smith *v.* Steele, 81 Mo. 455; Tombeckbee Bank *v.* Godbold, 3 Stew. 240; 20 Am. Dec. 80.

ever been given by any court against any person.[1] It is obvious that in some of the cases the entry offered in evidence has been disregarded, not from or on account of the absence of the essential elements of a judgment record, but because the court thought that such entry had been originally designed as nothing but a brief direction to the clerk, or as a certificate made by the clerk of some judgment already formally put upon the record. Thus "judgment rendered for plaintiff in the above-entitled suit at the above-named term by the court for the sum of seventy-eight and $\frac{37}{100}$ dollars damages, and his costs of suit, against said defendant on motion," was determined not to be the entry of a judgment. These words certainly show the action of the court, the nature and extent of the relief granted, and the parties against and to whom it was awarded. So far they are appropriate to the record of a judgment; but they do not appear to be the direction of the court itself. On the contrary, they seem rather to be the certificate of the clerk of certain events transpiring in court, as he recollects them, or as he understands them from such information as he may possess, than the original record of the court in relation to those events.[2] The words "judgment on verdict for $3,000 and costs," though found among the records, and showing, as they certainly do, that a final determination had been made, are not the record of a judgment. They neither show what authority directs nor how the direction is to be carried into effect. They are apparently intended as a mere memorandum for the information of the clerk.[3] The following entry was also rejected on a plea of *nul tiel record*, as implying at most only a minute of proceedings, and not the solemn act of the court determining the rights of the parties: "The following jury was sworn and impaneled [here follow twelve names], who find all the issues in favor of the plaintiff, and assess his damages at five hundred and

[1] Taylor *v.* Runyan, 3 Clarke, 474.

[2] Wheeler *v.* Scott, 3 Wis. 362.

[3] Martin *v.* Barnhardt, 39 Ill. 9.

eighty-five dollars. Judgment at September term, 1844, $585; the costs arising in this suit due to the county, to witnesses and officers of court, is $134.92."[1] The following have been declared to be insufficient as entries of judgments: "December 6, 1841. Reuben Emory and Harriett Emory *v.* Reuben Abbott. On hearing counsel in this cause, on motion of George Woodruff, plaintiffs' attorney, judgment for plaintiffs on demurrer, and that it be referred to the clerk to compute the amount due on the bond mentioned in the plaintiffs' declaration, and the clerk having computed the amount due on said bond at eight hundred dollars, the penalty thereof to be discharged on the payment of six hundred and twenty-four dollars and eleven cents, and costs to be taxed."[2] A record showing the issuing and return of a writ, and a docket entry that "the court grant judgment"; that proceedings had been taken before a sheriff's jury, by which the amount of plaintiff's damages has been assessed, and that another docket entry was thereupon made that "the court grant judgment on the finding of the inquest."[3] "The court, after due consideration, sustained said demurrer, and rendered judgment for the defendant, and against the plaintiff for the costs of the action, taxed at $11.20."[4] "Verdict for plaintiff; let writ issue."[5] "Judgment rendered upon the verdict of the jury."[6]

§ 53. **Justices' Courts.** — Though the nature of a final adjudication in a justice's court is in no respect different from that of a court of record, several causes uniting have produced rules of construction by which the records of the former court are scrutinized with less severity than those of the latter. In the first place, the higher courts being presided over by men of learning, and supplied with officers whose sole duties consist in keeping the

[1] Hinson *v.* Wall, 20 Ala. 298.
[2] Whitwell *v.* Emory, 3 Mich. 84; 59 Am. Dec. 220.
[3] Rape *v.* Heaton, 9 Wis. 328; 76 Am. Dec. 269.
[4] Miller *v.* B. & M. R. R. R. Co., 7 Neb. 227.
[5] Stark *v.* Billings, 15 Fla. 318.
[6] Meyer *v.* Teutopolis, 131 Ill. 152.

various papers filed in court in proper place and condition, and in reducing the various orders and directions of the judges to writing upon records required by law for that purpose, a loose memorandum would naturally be viewed with distrust when offered as the final result of all this learning and formality. Its form at once distinguishes it as an intruder, and shows its humble origin and design. But as justices of the peace, except in cities, rarely know anything of the technical learning of the common or even of the statute law, to insist upon their keeping their records with that accuracy and formality required in courts of record would end in the complete overthrow of most of their proceedings. Besides, as justices of the peace have no clerks assigned them by law, there is little ground for the presumption that even loose and disjointed memoranda, found upon their minutes or dockets, were designed as rough outlines for another hand to round into more perfect form.

§ 53 a. **Failure of Justice to Enter Judgment.** — In New York, justices of the peace are required to enter their judgments in their dockets within four days after the rendition thereof. But, under the general rule that the entry of the judgment is a ministerial act, the failure of a justice to comply with this part of the law within the time required has, by repeated decisions, been held to leave the judgment in full force.[1] The judge who delivered the opinion of the court of appeals in a recent case said the failure of the justice to obey the law is deserving of

[1] Hall *v.* Tuttle, 6 Hill, 38; 40 Am. Dec. 382; Walrod *v.* Shuler, 2 N. Y. 134; Martin *v.* Pifer, 96 Ind. 245. In Wisconsin, however, where the statute requires a justice, on receiving a verdict, to render judgment forthwith, his failure to so render it deprives him of jurisdiction, and his judgment rendered fourteen hours afterwards is void: Hull *v.* Mallory, 56 Wis. 355; Sibley *v.* Howard, 3 Denio, 72; 45 Am. Dec. 448. The statute is not satisfied by merely reading the verdict aloud in the presence of the by-standers and entering it on the docket: Smith *v.* Bahr, 62 Wis. 244. In Iowa, on the other hand, "forthwith," as used in statute concerning entry of judgments, is interpreted as signifying within a reasonable time, and a justice is not required to lay aside all other affairs, that he may act at once; though he delays twenty-four hours, he may be considered to have acted forthwith: Davis *v.* Simma, 14 Iowa, 154; 81 Am. Dec. 462; Burchett *v.* Casaday, 18 Iowa, 344.

censure, but added: "I am unable to find any principle of law requiring us to hold that the omission to docket must inflict a penalty upon the plaintiff, more justly due to the magistrate."[1] In Maine, a justice of the peace, after being out of office for three or four years, completed the record of a case tried during his official term, by writing up a judgment in his judgment-book. Of this transaction, Mellen, C. J., said: "A magistrate does not act judicially in making up and completing his record. In doing this, he performs himself what this court does through the agency of its clerk. It is a mere ministerial act. The judgment is regular."[2] In a case before a justice of the peace in California, the jury rendered a verdict in favor of the plaintiff "for one hundred and seventy-five dollars, in gold coin." This verdict was entered in the justice's docket, but no judgment was in fact entered in pursuance thereof. Subsequently, on application of the plaintiff, the justice issued an execution, reciting that a judgment had been rendered by him for that much money, and for costs of suit. Under this execution, a sale was made by the sheriff, at which the plaintiff became the purchaser. Relying upon title derived from this sale, the plaintiff brought an action of ejectment to recover the realty purchased by him; but the defendant insisted that the sale was void, on account of the failure to enter judgment upon the verdict. In considering this portion of the defense, the court said: "The justice, upon receiving the verdict, was required by statute to 'immediately render judgment accordingly.' The formal entry of the judgment was therefore a mere clerical duty imposed upon him by the statute, and the performance of which he had no discretion to decline. He might have been compelled to make the proper entry in his docket by judicial proceedings instituted against him for that purpose by the plaintiff; and it may be conceded that to issue an execution before judgment entered in form upon the verdict

[1] Fish *v.* Emerson, 44 N. Y. 377. [2] Matthews *v.* Houghton, 11 Me. 377.

would be a bad practice, and that a timely motion by the defendant to set it aside for that reason should be supported. That would be so, however, not because such an execution would be void, but because it would be irregular merely. And a failure to make the objection would, of course, amount to a waiver of the irregularity. As was said by the supreme court of New York:[1] 'We are to overlook matters of form, and to regard proceedings before justices of the peace according to the merits. Accordingly, in that case, a plea of former judgment in favor of the defendant was held to be supported by proof of a verdict in his favor, upon which the justice of the peace ought to have rendered judgment, but had omitted to do so.'"[2]

§ 54. **Reference to Another Case.** — The entry of a judgment, even in a justice's court, must either be perfect in itself, or be capable of being made perfect by reference to other parts of the docket, or to the papers on file in the action. An entry in which the identity of the parties cannot be ascertained without referring to the entry of some other case is fatally uncertain. The rule of construction permitting all the records and papers in a case to throw light upon an obscure entry is sufficiently liberal, and ought not to be extended so as to include the records or pleadings in another suit.[3]

§ 55. **On an Award.** — An action being tried by referees, they reported "that the defendant is indebted to the plaintiff on the above complaint in the sum of four dollars, and nine dollars and six cents costs of suit." The justice of the peace thereupon wrote: "Judgment rendered December 26, 1840. M. Tindal." A marginal note stated the amount of judgment and costs to be the same as

[1] Felter *v.* Mulliner, 2 Johns. 181.

[2] Lynch *v.* Kelly, 41 Cal. 232. See, to same effect, Gaines *v.* Betts, 2 Doug. (Mich.) 98; Hess *v.* Beckman, 11 Johns. 457; Overall *v.* Pero, 7 Mich. 315.

[3] McClellan *v.* Cornwell, 2 Cold. 298; Tombeckbee Bank *v.* Strong's Ex'rs, 1 Stew. & P. 187; 21 Am. Dec. 657.

named in the report. This was held to constitute a sufficient entry, because the inference was unavoidable that the judgment was intended to be in conformity with the award, this inference being strengthened by the marginal note, to which resort could be properly had to explain and uphold the judgment.[1]

Note. — The following entries of judgments have been considered sufficient in the higher courts: "Peacham, —— 16, 1828. Judgment rendered by the court for plaintiff, at $5.25. R. Blanchard, Justice of the Peace," accompanied by marginal entry of "Costs allowed, $5.25": See *Story* v. *Kimball*, 6 Vt. 541. "*H. C. Anderson* v. *M. L. Elcan.* Judgment granted *v.* defendant, M. L. Elcan, for $433.90. May 17, 1857. C. J. Spencer, J. P.": *Anderson* v. *Kimbrough*, 5 Cold. 260. In *Baratt* v. *Garragan*, 16 Iowa, 44, the transcript showed the proceedings up to and including trial, after which was written: "Judgment for plaintiff against the defendant for ——, October 24, 1856: —

| | | |
|---|---|---|
| "Damages | | $84 00 |
| "Justice's fee | $0 80 | |
| "Const | 25 | |
| "Two witnesses | 25 | |
| | | 1 30 |
| | | $85 30" |

This was pronounced a perfect judgment. It exhibited the time, the parties, and the result so clearly as to be unmistakable. This case was subsequently approved in *Church* v. *Crossman*, 41 Iowa, 373. In New York, the words "*Fish* v. *Emerson.* Testimony submitted June 30, 1863.

| | |
|---|---|
| "Judgment for plaintiff; damages | $124 80 |
| | 3 92 |
| | 128 72" |

— were held to be sufficient as the entry of a judgment: 44 N. Y. 376.

On the other hand, a judgment in this form: "The plaintiff filed his demand for thirty dollars; the defendant not appearing, the plaintiff proves his demand, and I gave judgment for the same," — was reversed for not being such a judgment as the law requires: *Polhemus* v. *Perkins*, 15 N. J. L. 435. "Be it remembered that at Barnard, April 23, 1836, Asaph Wilder, of Woodstock, was attached to answer James Wright, of Barnard, on former judgment of Lyman Stewart, Esq., in a case, *James Wright* v. *Loren Gay.* Now, the plaintiff says that the judgment of Lyman Stewart was collected by E. Parker, deputy sheriff, and converted same to his own use, and never accounted for same, nor any part thereof. The said Wright recovered judgment by default for the sum of $15.15 damages, and $1.99 costs of suit. Winslow W. Ralph, Justice of the Peace," — upon a plea of *nul tiel record* was considered as containing no legal evidence of a judgment, on the ground that it showed no court holden, no appearance by either party, no adjudication by the justice, no allusion to any writ or process or declaration, and no award of execution: *Wright* v.

[1] Elliott *v.* Morgan, 3 Harr. (Del.) 316.

*Fletcher*, 12 Vt. 431. A jury returned a verdict: "We, the jury, find in favor of the plaintiff, and assess his damages at in the sum of $4,493"; and the record showed the entry "whereupon the court enters judgment on the verdict." It was held that this entry had no element of a judgment other than the mere recognition of the verdict. "The *ideo consideratum est* is wanting": *Faulk* v. *Kellums*, 54 Ill. 189. "Gave judgment in favor of plaintiff for $171 and costs" is a sufficient entry of a justice's judgment: *Hutchinson* v. *Fulghum*, 4 Heisk. 550.

# CHAPTER III.

## OF THE ENTRY OF JUDGMENTS AND DECREES NUNC PRO TUNC.

PART I. — WHERE NO JUDGMENT WAS RENDERED.

§ 56. Policy and antiquity of the practice.
§ 57. Cases where delay is occasioned by non-action of the court.
§ 58. Where party is tied up by some motion.
§ 59. Entry to be made only when case was ready for final judgment.
§ 60. Not to be made, where the delay is not by the court.

PART II. — JUDGMENTS RENDERED, BUT NOT ENTERED.

§ 61. Cases where judgment was rendered, but not entered.
§ 62. Evidence to base entry upon.
§ 63. Parol evidence as basis of.
§ 64. Practice on application for.
§ 65. Withdrawal of jurisdiction.
§ 66. Saving of rights of third persons.
§ 67. Effect of.
§ 68. Must be confined to clerical omissions.

### PART I. — JUDGMENTS NOT RENDERED.

§ 56. **Policy and Antiquity of the Practice.** — The policy of entering judgments and decrees *nunc pro tunc* is agreeable to the maxim, *Actus curie neminem gravabit:* an act of the court shall prejudice no one. This maxim, says Mr. Broom, "is founded in justice and good sense; and affords a safe and certain guide to the administration of the law."[1] As an expression of the principle upon which judgments are given effect, as of some time prior to their actual entry, the maxim, in the interests of accuracy, requires to be changed to "a delay of the court shall prejudice no one." The power of making an entry *nunc pro tunc* seems to have been possessed and exercised by courts of law and of equity from the earliest times.[2] The period in which this power could be successfully invoked was never limited;[3] a decree in one instance being entered

[1] Broom's Legal Maxims, 115.

[2] Mayor of Norwick *v.* Berry, 4 Burr. 2277; Hodges *v.* Templer, 6 Mod. 191; Evans *v.* Rees, 12 Ad. & E. 167; Mays *v.* Hassell, 4 Stew. & P. 222; 24 Am. Dec. 750; Shephard *v.* Brenton, 20 Iowa, 41; Davis *v.* Hooper, 4 Stew. & P. 231; 24 Am. Dec. 751; Long *v.* Long, 85 N. C. 415.

[3] Reily *v.* Burton, 71 Ind. 118; Fuller *v.* Stebbins, 49 Iowa, 376. The power may be exercised in criminal

after the lapse of twenty-three years.[1] The practice was confined to those cases in which some hardship would be visited upon one of the parties without any fault of his, unless he was relieved from it by allowing his judgment to be entered at some period when he was legally entitled thereto, and of such a date as was necessary to avoid the embarrassment in which he would otherwise be involved. The power to enter judgments, decrees, and orders *nunc pro tunc* is inherent in the courts, both at law and in equity, and is not dependent for its existence upon any statute.[2] Whether it is inherent in the courts in the sense that they cannot be deprived of it by the legislature is, so far as we are aware, an undetermined question; but doubtless every statute purporting to confer this power or to provide the mode in which it may be exercised will be regarded as cumulative merely, and not as withholding the power, in cases where it existed by the common law, nor as limiting its exercise to the time and mode designated in the statute.[3]

§ 57. **Delay of the Court.** — The cases naturally resolved themselves into two classes. The first comprised a large number of actions in which no judgments had ever been rendered, but which were, so far as the suitors could make them, in condition for the rendition of final judgments. The second was composed of cases, comparatively few in number, in which judgments, though formally pronounced, had from accident or from negligence of the clerks never been put upon the records. The first class contained not only the greater number of cases, but each of the cases within it was, in all probability, more deserving of relief than any of the cases of the second class. No

prosecutions as well as in civil cases: Ex parte Beard, 41 Tex. 234; Smith *v.* State, 1 Tex. App. 408, 516; Ex parte Jones, 61 Ala. 399.

[1] Daniell's Chancery Practice, 1219; Lawrence *v.* Richmond, Jacob & W. 241. See also Downe *v.* Lewis, 11 Ves. 601; Drummond *v.* Anderson, 3 Grant (U. C.) 152; Reid *v.* Morton, 119 Ill. 118.

[2] Mitchell *v.* Overman, 103 U. S. 62; Reid *v.* Morton, 119 Ill. 118; Burnham *v.* Dalling, 16 N. J. Eq. 310.

[3] Chissom *v.* Barbour, 100 Ind. 1; Fuller *v.* Stebbins, 49 Iowa, 376.

case could be ranked among the first class in which the delay to render or enter judgment was imputable to any negligence or even misapprehension of the parties. The rule that no judgment would be ordered entered *nunc pro tunc* except for delay of the court admitted of no exceptions in theory, and was so constantly observed in practice that one of the judges remarked that he had never known of its violation during his experience, extending at bar and bench over a period of forty years.[1] The necessity for entering judgments as of some day prior to their rendition arose chiefly, if not exclusively, in those cases where, after the trial and submission of a cause, one of the parties died, as no judgment could properly be entered bearing date subsequent to his death. As the suitor who brought his action on to trial, and caused it to be tried and submitted, had manifestly been guilty of no laches, the court protected him from any prejudice he might suffer by the death of his adversary after such submission; and instead of permitting the action to abate, directed the judgment to be given effect, if necessary, as far back as the day of the submission. Thus the time taken by the court for deliberation was, as far as possible, prevented from working injustice to the party who should in the end prevail in his suit.[2] In the appellate courts, if a cause is argued and submitted either upon the merits or upon motion to dismiss the appeal, and thereafter one of the parties dies, the final judgment of reversal or affirm-

[1] Heathcote *v.* Wing, 11 Ex. 355; Freeman *v.* Trannah, 12 Com. B. 406; Fishmongers' Co. *v.* Robertson, 3 Com. B. 970; Lawrence *v.* Hodgson, 1 Younge & J. 368.

[2] Jarrett's Estate, 42 Ohio St. 199; Mitchell *v.* Schoonover, 16 Or. 211; 8 Am. St. Rep. 282; Jennings *v.* Ashley, 5 Pike, 128; Pool *v.* Loomis, 5 Pike, 110; Jones *v.* Le Davids, 2 Fowler's Ex. Pr. 169; Campbell *v.* Mesier, 4 Johns. Ch. 344; 8 Am. Dec. 570; Davies *v.* Davies, 9 Ves. Jr. 461; Wood *v.* Keyes, 6 Paige, 478; Hess *v.* Cole, 23 N. J. L. 116; Griswold *v.* Hill, 1 Paine, 483; Perry *v.* Wilson, 7 Mass. 393; Springfield *v.* Worcester, 2 Cush. 52; Astley *v.* Reynolds, 2 Strange, 917; Neil *v.* McMillan, 27 U. C. Q. B. 258; Day *v.* Cameron, 15 U. C. Q. B. 175; Abington *v.* Lipscomb, 11 L. J. Q. B., N. S., 15; Miles *v.* Williams, 16 L. J. Q. B., N. S., 47; Miles *v.* Bough, 15 L. J. Q. B., N. S., 30; Turner *v.* L. & S. W. R'y Co., 43 L. J. Ch. 430; Wilson *v.* Myers, 4 Hawks, 73; 19 Am. Dec. 510; McLean *v.* State, 8 Heisk. 22; Key *v.* Goodwin, 4 Moore & S. 620.

ance or dismissing the appeal will be entered as of some day prior to the death of the party but subsequent to the argument.[1]

§ 58. **Delay Occasioned by Motions.**— Besides the delay occasioned by the deliberations of the judges after the argument of a cause, the prevailing party was likely to be tied up by various motions whose pendency deprived him, for a time, of the fruits of his litigation. The consideration of these subjected him to the same peril and entitled him to the same relief as though he were endangered by being compelled to await the decision of the judges after the argument on the trial.[2] Hence if during the pendency of a motion in arrest of judgment,[3] or for a new trial, "whether after verdict or nonsuit, on demurrer or writ of error,[4] or to reduce the amount of an award,[5] or if pending the decisions of questions of law which could not be heard on account of press of business in court,"[6] one of the parties dies, the other may have judgment entered as of some term during the lifetime of his opponent.

§ 59. **Made only when Cause was Ready for Final Judgment.**— But in every case, to entitle the applicant to have his judgment entered *nunc pro tunc* on account of the death of one of the parties, the action must at the time of such death have been ready for the rendition of

[1] Richardson *v.* Green, 130 U. S. 104; Powe *v.* McLeod, 76 Ala. 418; Snow *v.* Carpenter, 54 Vt. 17; Citizens' Bank *v.* Brooks, 23 Fed. Rep. 21.

[2] Mitchell *v.* Schoonover, 16 Or. 211; 8 Am. St. Rep. 282; Skidaway S. R. R. Co. *v.* Brooks, 77 Ga. 136; Goddard *v.* Bolster, 6 Me. 427; 20 Am. Dec. 320; Tapley *v.* Goodsell, 122 Mass. 176; Long *v.* Stafford, 103 N. Y. 275; Beard *v.* Hall, 79 N. C. 506; Witten *v.* Robeson, 31 Mo. App. 525; Paige's Estate, 50 Cal. 40.

[3] Tidd's Practice, 8th ed., p. 966; Griffith *v.* Ogle, 1 Binn. 172; Brown *v.* Wheeler, 18 Conn. 199.

[4] Spalding *v.* Congdon, 18 Wend. 543; Ryghtmyre *v.* Durham, 12 Wend. 245; Currier *v.* Lowell, 16 Pick. 170; Tooker *v.* Duke of Beaufort, 1 Burr. 147; Terry *v.* Briggs, 12 Cush. 319; Dial *v.* Holter, 6 Ohio St. 228; Den *v.* Tomlin, 18 N. J. L. 14; 35 Am. Dec. 525.

[5] Bridges *v.* Smyth, 8 Bing. 29.

[6] Miles *v.* Williams, 9 Q. B. 47; Tapley *v.* Martin, 116 Mass. 275; Blaisdell *v.* Harris, 52 N. H. 191; Seymour *v.* Greenwood, 30 L. J. Ex. 189; Moor *v.* Roberts, 3 Com. B., N. S., 844; 4 Jur., N. S., 241; 27 L. J. Com. P. 161.

the final judgment.[1] It is not sufficient that an interlocutory judgment had been pronounced, and proceedings were pending in pursuance of a writ of inquiry,[2] nor that judgment had been given against the defendant on demurrer with leave to amend. In each of these cases no judgment could properly have been entered when the death occurred, and that event ought not to give the survivor any greater advantage than he previously possessed. "It [entering judgments *nunc pro tunc*] should be confined to cases where the judgment is final, as where a verdict has been rendered or a nonsuit ordered, which is confirmed by the court on motion for a new trial, or where a judgment is rendered on a special verdict, demurrer to evidence, or a writ of error. But according to the present practice judgment on demurrer is seldom final."[3]

§ 60. **Delay, not of Court.** — If, however, the delay is in no wise attributable to the court, nor to the tying up of the case during the time required to dispose of such motions as we have mentioned, no doubts nor difficulties, nor mistakes of law, in which one of the parties has been involved, will entitle him to this relief.[4] If, for instance, the counsel in a case are unable to decide at once what form of judgment or decree is best, and while discussing this matter among themselves the plaintiff or defendant dies,[5] or if a party, upon applying to have judgment signed, does not press the matter because one of the officers suggests a doubt as to whether it is not a legal holiday, and the defendant dies the same day,[6] neither of these cases warrants the interposition of the court. The court is in no way blamable for the doubts or misappre-

[1] O'Riordan *v.* Walsh, 8 I. R. C. L. 158; Hall *v.* Brown, 59 N. H. 198; Hazard *v.* Durant, 14 R. I. 25; Perkins *v.* Dunlavy, 61 Tex. 241. *Contra*, Webber *v.* Webber, 83 N. C. 280.

[2] Jennings *v.* Ashley, 5 Pike, 128.

[3] North *v.* Pepper, 20 Wend. 677; Kissam *v.* Hamilton, 20 How. Pr. 375.

[4] Tuomy *v.* Dunn, 77 N. Y. 515.

[5] Fishmongers' Co. *v.* Robertson, 3 Com. B. 970; 16 L. J. Com. P., N. S., 118; 4 Dowl. 656.

[6] Wilkes *v.* Perkes, 5 Man. & G. 376.

hensions of the parties nor of their advisers, and it will not change its course of proceeding to relieve them from the consequence of any mistake of law or of fact. That there is a surviving defendant is not a sufficient objection to the entry of judgment *nunc pro tunc*, if the other facts authorize it.[1] The rule that judgment will not be entered *nunc pro tunc* will, unless to relieve a party from injury attributable to a delay of the court, be enforced even where a delay has been occasioned by the party against whom the entry is sought to be made. Thus where judgment would have been entered within two terms after the entry of the verdict but for the fact that the plaintiff's executor was delayed in proving a will on account of a caveat entered by the defendant against the probate being granted, the court, though conceding the case to be one of extreme hardship, denied the application to enter judgment *nunc pro tunc*, one of the judges saying: "I think we ought not to be induced, by our desire to do substantial justice in the individual case, to depart from those general principles which are the only safe guides for the administration of the law."[2]

PART II. — CASES OF JUDGMENTS RENDERED, BUT NOT ENTERED.

§ 61. **In Relation to the Second Class of Cases**, some degree of negligence is always chargeable against the parties for not attending to having the proper entries made. Frequently, however, both parties suppose the judgment to be entered as well as rendered. Upon that supposition, process is issued and enforced, or other proceedings taken to carry out the judgment, and new rights and interests are based upon it. To protect these, it is occasionally necessary to have the judgment entered as of some time prior to their inception. The entry of judgment *nunc pro tunc* is always proper when a judgment has been ordered by the court, but the clerk has failed or neglected to copy

[1] Harrison *v.* Heathorn, 6 Scott N. R. 797; 1 Dowl. & L. 529.

[2] Freeman *v.* Trannah, 12 Com. B. 406; 21 L. J. Com. P., N. S., 214.

it into the record.[1] Therefore, if a judgment of divorce has been rendered which the clerk of the court has neglected to enter until after the death of one of the parties, he may be directed to enter it *nunc pro tunc* as of some day in the lifetime of the decedent,[2] on application of one who was not a party to the cause, and, when entered, it becomes operative as of the day of its rendition, and if collaterally drawn in question it is conclusive as to all matters of evidence necessary to its validity.[3] A sale of the lands of a minor having been made and reported to the court, and the judge having indorsed on the report his approval of the sale, an order was entered sixteen years afterwards approving the sale as of the day when the approval was indorsed on the report.[4] It would be idle to attempt the enumeration of the different classes of judgments which may be entered *nunc pro tunc*, for the rules of law upon this subject are no less applicable to one class of cases than to another. Nor is the power to make *nunc pro tunc* entries confined to judgments and decrees. It is a power which courts have and liberally exercise, to make their records speak the truth, and if a clerk has omitted to make an entry of any proceeding, whether before or after the final judgment or decree, the court may require him to supply his omission *nunc pro tunc*.[5] A judgment thus entered need not be one which the court or judge formally pronounced, if it was one which the law required the clerk to enter. Hence a clerk's neglect to enter, at the proper time, a judgment by confession or of voluntary dismissal may be set right by a *nunc pro tunc* entry.[6] It has been said that a court would not order judgment entered *nunc pro tunc* to enable a party to avoid

[1] Hagler *v.* Mercer, 6 Fla. 721; Howell *v.* Morlan, 78 Ill. 162; Franklin *v.* Merida, 50 Cal. 289; Fulton *v.* Fulton, 8 Abb. N. C. 210; Hansbrough *v.* Fudge, 80 Mo. 307; Belkin *v.* Rhodes, 76 Mo. 643; Forbes *v.* Navra, 63 Miss. 1; Whorley *v.* M. & C. R. R. Co., 72 Ala. 20; Aydelotte *v.* Brittain, 29 Kan. 98; Whittaker *v.* Gee, 63 Tex. 435.

[2] Estate of Cook, 77 Cal. 220; 11 Am. St. Rep. 267.

[3] In re Cook's Estate, 83 Cal. 415.

[4] Reid *v.* Morton, 119 Ill. 118.

[5] State *v.* Cox, 33 La. Ann. 1056; State *v.* Moran, 24 Neb. 103; Security Co. *v.* Arbuckle, 123 Ind. 518.

[6] Mountain *v.* Rowland, 30 Ga. 929; Davis *v.* Barker, 1 Ga. 559.

its effect by pleading against it his discharge in bankruptcy, and the reason suggested was, that the court would not thus aid him "to release himself from a valid claim against him."[1] There was, however, in the case in which this suggestion was made, no reason for entering the judgment as requested. The action was still pending when the discharge was granted, and it was not then known that any judgment would ever be entered against the bankrupt. He had not been prejudiced by any delay of the court, nor by any omission of its clerk, and was, therefore, not entitled to the special relief which he sought. Had the judgment been rendered against him before his discharge was granted, we apprehend that the court would have ordered it entered as of its proper date, though his object in procuring such entry was to bring the judgment within the operation of the discharge. Surely, one should not be deprived of a legal right granted him by the law and the courts, through the legal wrong of a clerk in omitting to discharge the duties imposed on him by law.

The questions of the greatest importance and difficulty in relation to the entry of judgments, orders, and decrees *nunc pro tunc* are, How shall it be shown,—1. That a judgment was rendered as alleged? and 2. If so rendered, what were the nature and extent of the relief given by it? During the term the proceedings are under control of the court, and no embarrassing questions can arise in relation to the exercise of its correctory powers. But after the term, upon what evidence can a motion for the entry of judgment as of some prior term be based? Upon this subject the decisions are not numerous. In most cases where the propriety of the entries came in question, the facts are stated in the reports without any intimation as to how those facts were made apparent to the court. Probably the weight of authority sustains the rule that only by some entry or memorandum on or

[1] Hall *v.* Brown, 59 N. H. 198.

among the records of the court can the rendition of a judgment be proved.[1] It is not necessary that the record state in express terms that a judgment was entered. If the facts shown by it "are such as to reasonably and fairly carry conviction that a judgment was in fact rendered, this is sufficient."[2] While in some of the cases in which judgments have been ordered entered *nunc pro tunc* it appeared that the judges rendering them had prepared written decisions, or had signed formal judgments or decrees, these facts were not material, except in so far as the decisions gave "the clerk surer means of correctly entering what had been adjudged." If the fact of the rendition of the judgment sufficiently appears from the minutes of the court, it may be ordered entered *nunc pro tunc*, though no written decision was filed and no formal judgment was signed by the judge, or prepared by the attorneys.[3] An entry must somewhere be found and produced in court, apparently made by the authority of the court. It must be in some book or record required to be kept by law in that court. Under this rule, a decree filed among the papers in a cause, signed by the judge, when the law did not require decrees to be reduced to writing and filed, and when no part of the records showed the rendition of any decree, was considered insufficient to warrant its entry *nunc pro tunc* as the formal decree of the court.[4] The motion docket being a book required by law to be kept, the memoranda there made are competent evidence to show the rendition of a judgment.[5] So is the opinion of a judge in writing, filed among the records in a case, if the law required it to be written and filed.[6]

[1] Metcalf *v.* Metcalf, 19 Ala. 319; 54 Am. Dec. 190; Hegeler *v.* Henckell, 27 Cal. 491; Fletcher *v.* Coombs, 58 Mo. 430; Draughan *v.* Tombeckee Bank, 1 Stew. 66; 18 Am. Dec. 38; Swain *v.* Naglee, 19 Cal. 127; Hyde *v.* Curling, 10 Mo. 359; Witten *v.* Robison, 31 Mo. App. 525; Gibson *v.* Chotean, 45 Mo. 171; 100 Am. Dec. 366; Herring *v.* Cherry, 75 Ala. 376; Robertson *v.* Pharr, 56 Ga. 245; Cadwell *v.* Dullaghan, 74 Iowa, 239; Carter *v.* McBroom, 85 Tenn. 377; Shackelford *v.* Levy, 63 Miss. 125; Camoron *v.* Thurmond, 56 Tex. 22. *Contra*, Bobo *v.* State, 40 Ark. 224.

[2] Witten *v.* Robison, 31 Mo. App. 525.

[3] Estate of Cook, 77 Cal. 220; 11 Am. St. Rep. 267.

[4] Hudson *v.* Hudson, 20 Ala. 364; 56 Am. Dec. 200.

[5] Yonge *v.* Broxson, 23 Ala. 684.

[6] State *v.* Mayor of Mobile, 24 Ala. 701.

§ 62. **Evidence to Base Entry on.**— But assuming the evidence to be competent for the purpose for which it is offered, and to show the rendition of some judgment, the question then to be determined is, Does it show with sufficient clearness what that judgment was? and if not, may its obscurity be removed by the use of other means of proof? The entry by a judge in his docket, "Jury and verdict for plaintiff, and fifteen per cent damages," taken in connection with the papers on file, was adjudged to afford no sufficient *data* for judgment *nunc pro tunc*, because the verdict may have been for less than the amount claimed by the plaintiff.[1] The memoranda on the trial docket of the orphans' court, as follows: "Joshua Morris, heir of A. Metcalf, use of J. W. Williamson, *v.* Adams. Judgment on demurrer. Leave to amend granted on payment of costs of the term. Costs paid by S. T. Roach, attorney. Ordered to appoint auditors, Benjamin Walding, Mathew Johnson, and Daniel Johnson. Ordered that they report *instanter*. Auditors' report in the hands of administrator, $469.82,"— were held not to sustain a *nunc pro tunc* decree, on account of their not showing the presentation of any accounts, the amounts received or paid out, the name of the administrator, nor whether the settlement was partial or final.[2] The words on motion docket, "Oct. Term, 1841,— Nonsuit," with lines drawn across the names of the plaintiff and defendant, according to the custom when a case was stricken from the docket, all done, confessedly, by the presiding judge at the time, authorize the entry of a judgment *nunc pro tunc*.[3] In Missouri, an entry *nunc pro tunc* cannot be sustained, if the court must, as to some essential fact, have acted either upon the recollection of the judge or upon evidence not found in the records or *quasi* records in the cause;[4] but an order granting a motion may be entered *nunc pro tunc*,

[1] Dickens *v.* Bush, 23 Ala. 849.
[2] Metcalf *v.* Metcalf, 19 Ala. 319; 54 Am. Dec. 190.
[3] Short *v.* Kellogg, 10 Ga. 180.
[4] Blize *v.* Castilo, 8 Mo. App. 290; Belkin *v.* Rhodes, 76 Mo. 643; Gamble *v.* Daugherty, 71 Mo. 599; Atkinson *v.* Atchison etc. R. R. Co., 81 Mo. 50.

if it appears from the files of the court that the motion was made and what its purpose was, and from a recital in an order of court that the motion had been granted.[1] In Indiana, an entry *nunc pro tunc* must be sustained by something in addition to parol evidence or the recollection of the judge. Therefore an order cannot be made after the expiration of a term of court stating that time was granted in that term for the filing of a bill of exceptions, when there is no record to sustain it.[2] The courts of Alabama, whose reports are wonderfully prolific in cases involving the power to enter judgments *nunc pro tunc*, have viewed such entries with unfounded alarm, and have seen the dangers arising from their encouragement, through some exaggerating medium. These courts are severe in their condemnation of the practice of assisting the record memoranda by parol evidence. An entry on the docket, "Estate of Solomon Perkins, deceased," "Final settlement," "Settlement made," accompanied by proof of the terms of the decree from memoranda made by the attorney on the back of the account, and by the testimony of the judge that he pronounced an oral decree in conformity with the memoranda, having been used with success upon the hearing of a motion to have a decree ordered entered in conformity with the proof of its rendition, the action of the court was reversed upon appeal, the appellate court saying: "If we can hold this sufficient, there is no telling where we ought to stop. If a judge can refresh his memory by writings made by a third person, and prove the terms of his decree in that way, it is the same in principle as allowing the terms of any judgment, verdict, or decree to be established altogether by oral testimony; and this would be a very dangerous precedent, and going much further than any of our decisions warrant."[3] The extreme position here taken is the logical

[1] Hansbrough *v.* Fudge, 80 Mo. 307.

[2] Schoonover *v.* Reed, 65 Ind. 313; Nye *v.* Lewis, 65 Ind. 326.

[3] Perkins *v.* Perkins, 27 Ala. 479. The fact that a paper is among the files in a case, purporting to be the verdict of a jury in favor of plaintiff, signed by its foreman, does not authorize the entry of judgment *nunc pro tunc*, there being no entry in any record to show the rendition of judgment: Herring *v.* Cherry, 75 Ala. 376.

result of the general rule frequently announced and more frequently violated, that a record can only be amended by some matter of record. Chief Justice Gibson, more than twenty years ago, said: "The old notion that the record remains in the breast of the court only till the end of the term has yielded to necessity, convenience, and common sense."[1]

§ 63. **Parol Evidence as Basis of.** — Whether the "old notion" has yielded so far as to authorize the entry of a judgment as of some prior date, when there is no record evidence of its rendition at such date, is doubtful; but the fact of the rendition of a judgment being made evident by the record, a decided preponderance of authority authorizes the court to proceed in its subsequent investigations with the aid of oral as well as of written evidence. Were the rule otherwise, the power of courts to furnish relief, made necessary by the negligence or inadvertence of their clerks, would be so restricted in its operation as to be of little or no utility. The instances where, in the absence of the formal entry of judgment, the records show the final determination with accuracy and completeness are few in number. Our attention should not be so riveted upon the possible evil which might occasionally arise from establishing by parol the terms of some unrecorded adjudication as to make us oblivious to the more probable evil of refusing to protect the interests growing up under actual adjudications, which, though confessedly existing, have not been reduced into the most authentic form. Courts have a continuing power over their records, not affected by the lapse of time. Should the record in any case be lost or destroyed, the court whose record it was possesses the undoubted power, at any time afterward, to make a new record. In doing this, it must seek information by the aid of such evidence as may be within its reach, tending to show the nature and existence of that which it is asked to re-establish. There is no reason why

[1] Rhoads *v.* Commonwealth, 15 Pa. St. 272.

the same rule should not apply, when, instead of being lost, the record was never made up, or was so made up as to express a different judgment than the one pronounced by the court. Hence the general rule that a record may be amended, not only by the judge's notes, but also by any other satisfactory evidence.[1]

"But we think it clear upon the authorities that the court may make such amendments upon any competent legal evidence, and that they are the proper judges as to the amount and kind of evidence requisite in each case to satisfy them what was the real order of the court."[2] "Each court must necessarily be the proper judge of what it has decided and adjudged, and when it orders an amendment of the record, the presumption of other courts must necessarily be that it does not undertake to order its clerk to record what it never had decided."[3] "Whether there was a mistake in the record was a question of fact to be established as any other fact in a court of justice by proper evidence. For this purpose the letter of the chief justice, the entries on the docket-books, *and the testimony of the witnesses* who heard the decision announced in open court, were all admissible."[4] Such evidence as is competent to amend a record ought to be competent to supply one. For a court in interfering with an existing record, whose inaccuracy is not evident from other matters of record, moves upon more doubtful ground than in conducting investigations when no matter of record needs to be modified or overthrown. In Massachusetts, the record of a judgment was completed after the lapse of twenty years, and the proposition affirmed that the amount of evidence for that purpose is within the discretion of the court.[5] The evidence in this case was oral. In another

[1] Matheson's Adm'r *v.* Grant's Adm'r, 2 How. 263; Clark *v.* Lamb, 8 Pick. 415; 19 Am. Dec. 332.

[2] Frink *v.* Frink, 43 N. H. 508; 80 Am. Dec. 172.

[3] Petition of Inhabitants of Limerick, 18 Me. 183.

[4] Weed *v.* Weed, 25 Conn. 337; Hollister *v.* Judges District Court of Lucas County, 8 Ohio St. 201; 70 Am. Dec. 100.

[5] Rugg *v.* Parker, 7 Gray, 172; 9 Gray, 209.

instance the entry seems to have been ordered upon motion, supported by an affidavit.[1] In several other cases, the reception of parol evidence has been sanctioned, for the purpose of showing the nature of the judgment alleged to have been rendered;[2] and in one the fact of the rendition of the judgment as well as the relief granted was established only by parol evidence.[3] Perhaps the most extreme case upon this side of the question and the one going the furthest to sustain *nunc pro tunc* entries is that of *Wight, Petitioner*, 134 U. S. 136. In that case the petitioner sought his release on *habeas corpus*, and his imprisonment was justified under a judgment of a district court of the United States. Before this judgment was rendered, the case had been certified to a circuit court of the United States, and was, so far as the records disclosed, pending in the latter court when the judgment was rendered in the former, and if such were the fact, the judgment of the district court was void. When the attention of the circuit court was called to the state of its records, it, on the 30th of September, 1889, "upon its own motion based upon its own recollection of the facts of the making of the order," on the twelfth day of March, 1889, remanding the case to the district court, directed such order to be entered *nunc pro tunc* as of the day last named, and the order being so entered, it then appeared therefrom that the cause had been remitted to the district court and that it had jurisdiction over Wight at the time it passed judgment against him and directed his imprisonment. In the report of the case it is not shown that any evidence whatever was offered that any order had been made on the twelfth day of March remanding the case to the district court. The judge, in directing the *nunc pro tunc* entry, professed to act wholly on his recollection, and while there is no occasion in this instance to doubt the accuracy of

[1] Doe *v.* Litherbery, 4 McLean, 442.

[2] Burnett *v.* State, 14 Tex. 455; 65 Am. Dec. 131; State *v.* McAlpin, 4 Ired. 140; Johnson *v.* Wright, 27 Ga. 555; Davis *v.* Shaver, 1 Phill. (N. C.) 18; 91 Am. Dec. 92; Aydelotte *v.* Brittain, 29 Kan. 98.

[3] Bobo *v.* State, 40 Ark. 224.

such recollection, and it was probably not disputed by the prisoner, yet we cannot view this precedent otherwise than with alarm. If a judge is to act wholly on his recollection, and is not even required to give evidence of it as if he were a witness, by what method can one injured by a *nunc pro tunc* entry obtain a review of the action of the court? and by what means can an unscrupulous judge, should one ever be elevated to the bench, be prevented from entering *nunc pro tunc* judgments which were never before rendered? The court, in making its decision, acted chiefly upon a statement of the law upon this subject made by Mr. Bishop in section 1160 of the first volume of his work on criminal procedure, and that section may be so construed as to support the action of the court. The authorities, however, which Mr. Bishop cites do not, any of them, necessarily sustain the position which the supreme court of the United States understood him to maintain, and some of them were decisions of the supreme court of Missouri, a court which has uniformly refused to act except upon some matter of record. Of the cases cited the most relevant was *Bilansky* v. *State*, 3 Minn. 427. An examination of that case reveals that no final judgment had been rendered, and that the court proceeded on the ground that, until final judgment, all proceedings are *in fieri* and subject to amendment, and in the case before the court the counsel for the defendant did not deny that the proposed amendments were necessary to make the record speak the truth. There is nothing in the report of the Minnesota case to show whether or not the amendments were supported by the records, and certainly nothing to indicate that the judge acted on his recollection and in the absence of all evidence.

§ 64. **Practice in Obtaining Nunc pro Tunc Entries.**— The circumstances in which *nunc pro tunc* entries become necessary or proper are so varied that rules of practice applicable to all cases cannot be formulated. Doubtless

all courts have the right and are under the duty to make their records speak the truth and the whole truth, whether the parties to the action or any other person wishes them to do so or not, and a court may therefore direct a *nunc pro tunc* entry on its own motion, as was done in Wight's case, 134 U. S. 136.[1] Any person having rights dependent upon or affected by a judgment may call the attention of the court to the failure of its clerk to enter it, and ask that the entry be made as of the day when the judgment was rendered.[2] The proceedings on application to enter judgment *nunc pro tunc* are summary, and not required to be supported by pleadings.[3] The practice in some courts seems to require the moving party to give notice of his motion to his adversary,[4] and certainly this is very proper when the entry is not required to be made as a matter of course, and where the motion is supported by other evidence than the records or *quasi* records of the court. If the moving party wishes to use the entry, when procured, to affect the rights of one not a party to the action, he should be notified of the motion. If he does not appear to have had notice of the rendition of the judgment, nor of the motion to enter it *nunc pro tunc*, he may sometimes escape the effect of the entry.[5] The more usual practice is to proceed *ex parte* to order entries required to complete the record, especially where the court acts solely upon matters of record.[6]

§ 65. **Termination of Jurisdiction.** — In Ohio, it has been decided that if, after the rendition of a judgment, and before the entry thereof, the jurisdiction of the court over that class of cases is withdrawn, the court as to them

[1] Crim *v.* Kessing, 89 Cal. 478.

[2] Estate of Cook, 77 Cal. 220; 11 Am. St. Rep. 267; Reid *v.* Morton, 119 Ill. 118; Crim *v.* Kessing, 89 Cal. 478.

[3] Urbaniski *v.* Manns, 87 Ind. 585.

[4] Berthold *v.* Fox, 21 Minn. 51; King *v.* Burnham, 129 Mass. 598.

[5] Koch *v.* Atlantic and Pacific R. R. Co., 77 Mo. 354.

[6] Fuqua *v.* Carriel, 1 Minor, 170; 12 Am. Dec. 46; Allen *v.* Bradford, 3 Ala. 281; 37 Am. Dec. 689; Stokes *v.* Shannon, 55 Miss. 583; Nabers *v.* Meredith, 67 Ala. 333; Long *v.* Stafford, 103 N. Y. 274; Portis *v.* Talbot, 33 Ark. 218; Estate of Cook, 77 Cal. 220; 11 Am. St Rep. 267; Crim *v.* Kessing, 89 Cal. 478.

ceases to exist, and cannot enter its judgment *nunc pro tunc*.[1] The correctness of this decision may well be doubted. The case seems to us to be one where the correctory powers of the court could have been employed in the furtherance of justice, without any infringement of the law. The jurisdiction of the court over the case had been completed by *hearing* and *determining* the issues involved, and by granting appropriate relief. What remained to be done after the withdrawal of jurisdiction, either in giving effect to the judgment or in correcting or completing the records, the court had power to do by virtue of its general jurisdiction, and its continuing power over its records. In considering whether there was an omission of something from its records which ought not to be omitted, the court was not in the exercise of the same kind of jurisdiction exercised by it in trying the cause; nor was the jurisdiction over the records necessarily dependent upon the continuance of jurisdiction over the subject-matter of the suit. Where an action was brought under a statute, and judgment rendered, which was delayed by the pendency of a motion for a new trial, during which the statute was repealed, judgment was entered as of a time when the statute was in force.[2]

§ 66. **Rights of Third Persons.**—The entry of judgments or decrees *nunc pro tunc* is intended to be in furtherance of justice.[3] It will not be ordered so as to affect third persons who have acquired rights without notice of the rendition of any judgment.[4] Generally, such conditions will be imposed as may seem necessary to save the interests of third parties, who have acted *bona fide* and without notice; but if such conditions are not expressed

[1] Ludlow *v.* Johnson, 3 Ohio, 553; 17 Am. Dec. 609.

[2] Springfield *v.* Worcester, 2 Cush. 52.

[3] Hemming *v.* Batchelor, 23 Week. Rep. 398; 33 L. T., N. S., 16; 44 L. J. Ex. 54.

[4] Galpin *v.* Fishburne, 3 McCord, 22; 15 Am. Dec. 614; Miller *v.* Wolf, 63 Iowa, 233; Smith *v.* Hood, 25 Pa. St. 218; 64 Am. Dec. 692; Bank of Newburgh *v.* Seymour, 14 Johns. 219; Koch *v.* A. & P. R. R. Co., 77 Mo. 354; Nimle *v.* Clark, 62 Mich. 124; 4 Am. St. Rep. 823.

in the order of the court, they are, nevertheless, to be considered as made a part of it by force of the law. The public are not expected nor required to search in unusual places for evidences of judgments. They are bound to take notice of the regular records, but not of the existence and signification of memoranda made by the judge, and upon which the record may happen to be afterwards perfected.[1] The expression so frequently made that a *nunc pro tunc* entry is not to affect the rights of third persons must not be understood as signifying that effect must be denied to such an entry in all cases where third persons have acquired interests. Courts in determining whether or not to amend or perfect their records are controlled by considerations of equity. If one not a party to the action has, when without notice of the rendition of the judgment or of facts from which such notice must be imputed to him, advanced or paid money or property, or in other words, has become a purchaser or encumbrancer in good faith and upon a valuable consideration, then the subsequent entry of such judgment *nunc pro tunc* will not be allowed to prejudice him. Otherwise its effect against him is the same as if it had been entered at the proper time.[2]

§ 67. **Effect of.**—When a judgment has been entered *nunc pro tunc*, and is offered in evidence in another action or proceeding, it will be presumed to have been entered regularly and upon competent and sufficient evidence.[3] With the exception pointed out in the previous section, a judgment entered *nunc pro tunc* must be everywhere received and enforced in the same manner and to the same extent as though entered at the proper time. Though an execution may have issued, and proceedings under it cul-

[1] Hays *v.* Miller, 1 Wash. 163; Jordan *v.* Petty, 5 Fla. 326; McCormick *v.* Wheeler, 36 Ill. 114; 85 Am. Dec. 388; Graham *v.* Lynn, 4 B. Mon. 17; 39 Am. Dec. 493; Acklen *v.* Acklen, 45 Ala. 609.

[2] Leonard *v.* Broughton, 120 Ind. 536; 16 Am. St. Rep. 347; Tapley *v.* Goodsell, 122 Mass. 176.

[3] Estate of Cook, 83 Cal. 415; Allen *v.* Sales, 56 Mo. 28; Belkin *v.* Rhodes, 76 Mo. 643; Bryan *v.* Streeter, 57 Ala. 104.

minated by the sale of property, when there was nothing on the record to support it, yet the omission was one of evidence, and not of fact, and the evidence being supplied in a proper manner, full force and effect will be given to the fact as if the evidence had existed from the beginning.[1] Where, however, the entry of judgment *nunc pro tunc* is not occasioned by the negligence of the clerk in not entering a judgment duly rendered, but by the death of a party after the cause was submitted and before its decision, then the only object of the entry is to relieve the judgment from the apparent error of having been given after the death of a party. For most purposes, the effect of the judgment is not different from what it would be had it not been entered *nunc pro tunc*, because until its rendition no proceedings could be taken for its enforcement. Therefore the statute of limitations does not commence to run against an action upon it until the date of its actual rendition.[2]

§ 68. **Must be Based on Previous Act of the Court.**— It must be observed that the entire purpose of entering judgments and decrees as of some prior date is to supply matters of evidence, and not to supply or modify matters of fact. The failure of a court to act, or its incorrect action, can never authorize a *nunc pro tunc* entry. If a court does not render judgment, or renders one which is imperfect or improper, it has no power to remedy any of these errors or omissions by treating them as clerical misprisions.[3]

[1] Graham *v.* Lynn, 4 B. Mon. 17; 39 Am. Dec. 493; Davis *v.* Shaver, 1 Phill. (N. C.) 18; 91 Am. Dec. 92; Rugg *v.* Parker, 9 Gray, 209; Burnett *v.* State, 14 Tex. 455; 65 Am. Dec. 131; Bush *v.* Bush, 46 Ind. 70; Barker *v.* Stow, 20 Blatchf. 185; Tapley *v.* Goodsell, 122 Mass. 176.

[2] Borer *v.* Chapman, 119 U. S. 587.

[3] Gray *v.* Brignardello, 1 Wall. 627; Petition of Inhabitants of Limerick, 18 Me. 183; Hyde *v.* Curling, 10 Mo. 359; Gibson *v.* Chouteau, 45 Mo. 171; 100 Am. Dec. 366; Fetters *v.* Baird; 70 Mo. 389; Woolridge *v.* Quinn, 70 Mo. 370; Cassidy *v.* Woodward, 77 Iowa, 355; Garrison *v.* People, 6 Neb. 274.

# CHAPTER IV.

## AMENDING JUDGMENTS.

§ 69. During term.
§ 70. Correcting judgment after term.
§ 71. Amending judgment entry.
§ 72. *Data* for, in the United States.
§ 72 a. Notice of application.
§ 73. Time within which amendments may be made.
§ 74. Effect of amendments as against parties and strangers.
§ 74 a. Discretion of court in amending judgments.

§ 69. **During Term.** — "During the terme wherein any judiciall act is done, the record remaineth in the brest of the judges of the court, and in their remembrance, and therefore the roll is alterable during that terme, as the judges shall direct; but when the terme is past, then the record is in the roll, and admitteth no alteration, averment, or proof to the contrarie."[1] Of the law thus laid down, the only part remaining unshaken to the present time is, that during the term the proceedings remain in the breast of the judges. Not only do the records during that time remain subject to the revision of the court, but the judgment itself may be altered, revised, or revoked, as well as amended in respect to clerical errors and matters of form.[2]

[1] Co. Lit. 260 a; 3 Bla. Com. 407.

[2] Barrell *v.* Tilton, 119 U. S. 637; Alabama G. L. Ins. Co. *v.* Nichols, 109 U. S. 232; Wolmerstadt *v.* Jacobs, 61 Iowa, 372; Ryon *v.* Thomas, 104 Ind. 59; Goddard *v.* Ordway, 101 U. S. 745; State *v.* Dougherty, 70 Iowa, 439; Moore *v.* Taylor, 1 Idaho, N. S., 630; Morgan *v.* Eggers, 127 U. S. 63; Burch *v.* Scott, 1 Bland, 112; Dane's Abr., c. 146, art. 5, sec. 11; Stahl *v.* Webster, 11 Ill. 511; De Castro *v.* Richardson, 25 Cal. 49; Obenchain *v.* Comegys, 15 Ind. 496; Robinson *v.* Comm'rs, 12 Md. 132; Lane *v.* Ellinger, 32 Tex. 369; Palsgrave *v.* Ross, 2 L. C. Jur. 95; Richardson *v.* Howk, 45 Ind. 451; United States *v.* Harmison, 3 Saw. 556; Memphis *v.* Brown, 94 U. S. 715; Green *v.* Pittsburgh etc. R. R. Co., 11 W. Va. 685. But in Grant *v.* Schmidt, 22 Minn. 1, it was held that the common-law rule authorizing the judge to set aside, correct, or modify his judgment at any time during the term was inapplicable to the system of practice in that state; that "the control of the court over causes coming before it (except where retained by the statute, and except the necessary control over its records which every court has) terminates with the entry of judgment"; and therefore that the only mode in which a judgment could be modified or vacated was by appeal, or by motion for a new trial.

§ 70. **Correcting Judgments.** — As a general rule, no final judgment can be amended after the term at which it was rendered. The law does not authorize the correction of judicial errors under the pretense of correcting clerical errors. To entitle a party to an order amending a judgment, order, or decree, he must establish that the entry as made does not conform to what the court ordered.[1] Thus if a solicitor inadvertently omits from a decree some clause which he intended to insert, and presents the decree to the judge, who adopts it as the judgment of the court, this is no ground for an amendment, for the facts do not show that the court intended to pronounce any different decree from the one prepared by the solicitor; and to change the record would be equivalent to exercising a revisory power over the judgment itself by the same authority that pronounced it.[2] The following amendments have been declared improper, because correcting or revising judicial action, or supplying the want of it, rather than correcting clerical errors or supplying clerical omissions: Changing a judgment against plaintiff for costs to a judgment against the person for whose benefit plaintiff in his official capacity as clerk of the court brought the action;[3] correcting an alleged error in the mode of computing interest;[4] allowing interest when the judgment as first entered did not allow any;[5] showing that the court was of the opinion that plaintiff ought to recover costs, notwithstanding the smallness of his recovery;[6] changing a

[1] Garlington *v.* Copeland, 32 S. C. 57; Ross *v.* Ross, 83 Mo. 100; Moore *v.* State, 63 Ga. 165; Becker *v.* Sauter, 89 Ill. 596; Botkin *v.* Comm'rs, 1 Ohio, 375; 13 Am. Dec. 630; Bramlett *v.* Pickett, 2 A. K. Marsh. 10; 12 Am. Dec. 350; Balis *v.* Wilson, 12 Mart. (La.) 358; 13 Am. Dec. 376; Bethel *v.* Bethel, 6 Bush, 65; 99 Am. Dec. 655; Smith *v.* Hood, 25 Pa. St. 218; 64 Am. Dec. 692; Crew *v.* McCafferty, 124 Pa. St. 200; 10 Am. St. Rep. 578; Phillips *v.* Negley, 117 U. S. 665; Russell *v.* United States, 15 Ct. of Cl. 168; Gray *v.* Vandyke, 5 Del. 134; Browden *v.* Faulkner, 82 Ala. 257; Evans *v.* Fisher, 26 Mo. App. 541; Boyd *v.* Platner, 5 Mont. 226.

[2] Forquer *v.* Forquer, 19 Ill. 68; Bac. Abr., tit. Amendments, etc., F; Scroggins's Adm'r *v.* Scroggins, 1 J. J. Marsh. 362; Powell's Appellate Proceedings, 387; Dorsey *v.* Dorsey, 37 Md. 74; 11 Am. Rep. 528; Kemp *v.* Cook, 18 Md. 131; 79 Am. Dec. 681; Bertrand *v.* Gugy, 9 L. C. Rep. 260; Huot *v.* Page, 9 L. C. Rep. 226.

[3] Boland *v.* Benson, 54 Wis. 387.

[4] Garrett *v.* Love, 90 N. C. 368.

[5] Factors & T. Ins. Co. *v.* New. H. P. Co., 39 La. Ann. 583.

[6] Shackelford *v.* Levy, 63 Miss. 125.

judgment of dismissal to one of dismissal "upon merits";[1] showing the due appointment of a guardian *ad litem* for minors, his acceptance in writing, and his having acted for such minors in the settlement of an administration.[2]

To the rule that a judgment as rendered cannot be amended after the lapse of the term, some apparent exceptions are well supported by authority. In some of the states the courts may, at any time, add to their judgments such clauses as may be necessary to carry them into effect, when there is anything in the judgment by which to amend.[3] In New York, the omission from a decree of any matter which, if applied for on the hearing, would have been granted as a matter of course, "as necessary or proper to carry into effect the decision of the court," will be supplied on motion.[4] In such case the omission will be corrected by a distinct order, without making any change upon the decree.[5] These exceptions, tolerated at first on the ground that they did not affect the merits of the case so as to require a rehearing, came to be regarded as authority for interference in matters of substance and importance. An action was instituted on the joint and

[1] Williams *v.* Hayes, 68 Wis. 246.

[2] Horton *v.* Beadle, 62 Ala. 32.

[3] Trammell *v.* Trammell, 25 Tex. App. 261. Thus where it appears from the record that a name ought to have been inserted in the judgment, the record was amended by inserting such name: Bank *v.* Seymour, 14 Johns. 219. An amendment has also been authorized after the lapse of the term so as to make the judgment bear interest, because, by the rule of the court, interest was allowed at a certain rate, and the omission to include it in the judgment must be deemed a clerical error: Bank *v.* Wistar, 3 Pet. 431. In England, the broad rule is laid down, that "it is always open to the court on motion to correct its judgment to relieve any party who may be unduly prejudiced by any act done under its order, and to prevent any injurious consequences which may flow from its error": Kelly, C. B., in Huffer *v.* Allen, L. R. 2 Ex. 15.

[4] Gardner *v.* Dering, 2 Edw. Ch. 131; Ray *v.* Connor, 3 Edw. Ch. 478; Rogers *v.* Rogers, 1 Paige, 188; Stannard *v.* Hubbell, 123 N. Y. 520. "The rule respecting the amendment of decrees as it has been enforced by this court may be stated as follows: The court will not vary or alter an enrolled decree in a material point without a bill of review or a rehearing, but it will amend its enrolled decree, even in a material respect, on petition, whenever amendment is necessary to give full expression to the judgment of the court, and the amendment is such as the court would have made when the decree was entered, if it had been asked for": Jones *v.* Davenport, 45 N. J. Eq. 77; Dorsheimer *v.* Rorbach, 24 N. J. Eq. 33; Ruchman *v.* Decker, 27 N. J. Eq. 244; Jarmon *v.* Wisnall, 24 N. J. Eq. 68.

[5] Clark *v.* Hall, 7 Paige, 382.

several bond of two, secured by a mortgage made by one only. A decree was taken for the sale of the mortgaged premises and against the mortgagor for the deficiency which should exist after the sale. Upon application, without suggestion of any misprision of the clerk, the decree was amended so as to be against both defendants for the deficiency. Upon appeal, the chancellor said: "I have hesitated, therefore, whether it could be proper without a rehearing to amend the decree in a matter of substance so material to the rights of the appellant; and upon examination of the cases I am satisfied such an amendment would not have been permitted in the courts of chancery in England and in Ireland, without discharging the enrollment and granting a formal rehearing of the cause." He considered, however, that a different rule had been established by the cases allowing amendments, by inserting what would have been granted as a "matter of course"; that in the present case both defendants were properly parties to a decree for the deficiency; that a decree so drawn would have been signed as "a matter of course" in the first instance; and therefore that the amendment, as a matter of course, had been properly made.[1] Similar in effect was the following, from an opinion in a late case in California: "The judgment in this case as first entered was defective, in not designating the defendants who were personally liable for the debt; but inasmuch as the record shows who they were, the court had power to amend the judgment at any time, by adding a clause designating the defendants who were personally liable.[2] But the failure of the court to render judgment according to law must not be treated as a clerical misprision. Where there is nothing to show that the judgment entered is not the judgment ordered by the court, it cannot be amended.[3]

[1] Sprague *v.* Jones, 9 Paige, 395.

[2] Leviston *v.* Swan, 33 Cal. 480.

[3] Rogers *v.* Bradford, 8 Bush, 164. If a judgment is entered by consent, it cannot be corrected by amendment, unless it is shown that the judgment entered is not the one to which the consent was given: Knox *v.* Moser, 72 Iowa, 154; McEachem *v.* Kerchner, 90 N. C. 177; Gray *v.* Robinson, 90 Ind. 527.

On the one hand, it is certain that proceedings for the amendment of judgments ought never to be permitted to become revisory or appellate in their nature; ought never to be the means of modifying or enlarging the judgment or the judgment record, so that it shall express something which the court did not pronounce, even although the proposed amendment embraces matter which ought clearly to have been so pronounced.[1] On the other hand, there are many cases in which it so clearly appears that the judgment as entered is not the sentence which the law ought to have pronounced upon the facts as established by the record, that the court acts upon the presumption that the error is a clerical misprision, rather than a judicial blunder, and sets the judgment, or rather the judgment entry, right by an amendment *nunc pro tunc*.[2] The chief objection to the rule permitting amendments to insert that which would have been inserted as a "matter of course," had the attention of the court been directed to it when the judgment was rendered, is in the uncertainty of its application, arising from the difficulty of determining what is a "matter of course." When the facts are settled by written findings, or otherwise made certain, every judge, it must be presumed, would as a "matter of course" award complete and appropriate relief with respect to every matter brought to his attention, if it were not for the possibility of his erring in regard to the law. Relief which one judge may grant "as a matter of course," another may deny "as a matter of course"; and if amendments in matters of substance may be made as "matters of course," it may follow that relief may be awarded as an amendment which would have been refused had it been asked when the judgment was pronounced.

[1] McLean *v.* Stewart, 21 N. Y. Sup. Ct. 472; Milan County *v.* Robertson, 47 Tex. 222; Turner *v.* Christy, 50 Mo. 145; Durning *v.* Burkhardt, 34 Wis. 585.

[2] Anderson *v.* Parker, 6 Cal. 201; Schroeder's Estate, 46 Cal. 316; Doane *v.* Glenn, 1 Col. 456; Sprague *v.* Jones, 9 Paige, 395; Huntington *v.* Zeigler, 2 Ohio St. 10; Smith *v.* Kennedy, 63 Ala. 334.

Generally, when a court has disposed of a cause by its final judgment, and its jurisdiction is not continued by a motion for a new trial or some similar proceeding, it has, after the lapse of the term, no further authority over the parties or the subject-matter of that action, except such as arises from proceedings to give effect to the judgment. It may, however, under the pretense of correcting clerical errors or omissions, direct the judgment to be altered in some matter of substance, so as to either withhold relief given by the original judgment or grant relief not there awarded. In such a case its action is clearly judicial and revisory, being devoted to correcting its supposed errors or its want of action, and not to making its records speak the truth. Upon principle, its action seems to be taken in a cause and over a matter of which it has no jurisdiction, and therefore to be void, and this is the view taken in some courts,[1] while others deny this conclusion and assert that the amendatory order must be treated as valid, until set aside upon appeal or by some other proceeding.[2]

§ 71. **Correcting Clerical Errors and Omissions.** — The rule that the record admits of no alteration after the term is obsolete. Even in England the judgment may be set right and amended by another part of the record, so as to correct any misprision or neglect of the clerk in entering the names of the parties; or in the form of the judgment. In all cases the entry of judgment may be made to conform to the record and the instructions of the clerk.[3] All courts have inherent power to correct clerical errors at any time,[4] and to make the judgment entry correspond with the judgment rendered.[5] This power exists in

[1] Thompson *v.* Thompson, 73 Wis. 84.

[2] Stannard *v.* Hubbell, 123 N. Y. 520.

[3] Bac. Abr., tit. Amendments, F.

[4] Burson *v.* Blair, 12 Ind. 371; Bank of U. S. *v.* Moss, 6 How. 31; Finnell *v.* Jones, 7 Bush, 359; Paddon *v.* Bartlett, 5 Nott & McC. 384; Duvall *v.* Wells, 4 Har. & McH. 164; Brush *v.* Robbins, 3 McLean, 486; O'Connor *v.* Mullen, 11 Ill. 57.

[5] Scroggins's Adm'r *v.* Scroggins, 1 J. J. Marsh. 362; Gibson *v.* Wilson, 18 Ala. 63; Chambers *v.* Hodges, 3 Tex. 517; Jenkins *v.* Eldridge, 1 Wood

criminal prosecutions as well as in civil cases.[1] Where the record contains sufficient matter to show that the judgment entered is not the one rendered, it may be corrected in respect to the amount or kind of money recovered of defendant,[2] or the number of days' imprisonment which he must suffer,[3] or by inserting the names of the members of the partnership where their firm name only had been stated,[4] or otherwise correcting the name of a party,[5] or giving the true date of the rendition of a judgment,[6] or including a party whose name had been omitted from the original entry,[7] or excluding one whose name had been improperly inserted,[8] or supplying, in a judgment against a garnishee, the clerk's failure to recite the amount of the original judgment,[9] or stating the rate of interest which the judgment is to bear,[10] or making the judgment for defendant instead of for plaintiff, where its entry in favor of plaintiff was inadvertent,[11] or conforming the judgment to the directions of an appellate court when it had been inadvertently entered so as not to comply with such directions,[12] or correcting a mistake in computing the amount due on a note,[13] or supplying the omission of the clerk to state that a foreclosure sale should be made "with-

& M. 61; Harris *v.* Billingsley, 18 Ala. 438; Durning *v.* Burkhardt, 34 Wis. 585; Robertson *v.* Neal, 60 Mo. 579; State *v.* Primm, 61 Mo. 166; Wolfley *v.* Lebanon M. Co., 3 Cal. 296.

[1] Ex parte Jones, 61 Ala. 399.

[2] Miller *v.* Royce, 60 Ind. 189; Modawell *v.* Hudson, 57 Ala. 75; Sherry *v.* Priest, 57 Ala. 410; Mitchell *v.* Lincoln, 78 Ind. 561; Alpers *v.* Schammel, 75 Cal. 590; Wall *v.* Covington, 83 N. C. 144; Tunstall *v.* Schoenpflug, 4 Baxt. 43; Hittson *v.* Davenport, 4 Col. 169; Miller *v.* Royce, 60 Ind. 189.

[3] Ex parte Jones, 61 Ala. 399.

[4] Wright *v.* McCampbell, 75 Tex. 644.

[5] Merrick *v.* Mayhue, 40 Mich. 196; Chandler *v.* Frost, 88 Ill. 559; Smith *v.* Redus, 9 Ala. 99; 44 Am. Dec. 429; Kenney *v.* Young, 25 Ala. 563; Barber *v.* Briscoe, 9 Mont. 341; Shelly *v.* Dobbins, 31 La. Ann. 530. But where the name of a party is incorrectly stated in the complaint, summons, and judgment, it cannot be corrected by an amendment: Brown *v.* Terre Haute etc. R. R. Co., 72 Mo. 567.

[6] Grimes *v.* Grosjean, 24 Neb. 700; Carlton *v.* Patterson, 29 N. H. 580; Burnham *v.* Chicago, 24 Ill. 496; Hood *v.* Spaith, 51 N. J. L. 129.

[7] Freeman *v.* Mears, 35 Ark. 278; Shaul *v.* Duprey, 48 Ark. 331.

[8] Henderson *v.* Banks, 70 Tex. 398; Crispen *v.* Hannovan, 86 Mo. 160; Renfro *v.* Willis, 67 Ala. 488.

[9] Memphis and Charleston R. R. Co. *v.* Whorley, 74 Ala. 264.

[10] Evans *v.* Fisher, 26 Mo. App. 541; Bank of Ky. *v.* Wistar, 3 Pet. 432.

[11] Morrison *v.* Stewart, 21 Ill. App. 113.

[12] In re Mahon, 71 Cal. 536.

[13] Hughes *v.* Hinds, 69 Ind. 93.

out relief from the appraisement laws,"[1] or correcting a description of land,[2] or the writing of a date,[3] or changing the amount of interest allowed from six to ten per cent, and waiving the benefit of appraisement laws,[4] or inserting in a decree in partition the instructions as to the methods of making partition which are contained in the statute,[5] or showing how and to whom costs were to be paid,[6] or the term which the plaintiff recovered in ejectment.[7] Further illustrations are needless. In whatever respect the clerk may have erred in entering judgment, the court may, on proper evidence, nullify the error by making the judgment entry fully and correctly express the judgment rendered.[8] The entry may also be amended to show that the recovery was for or against a party in some representative capacity; and if against him in such capacity, to relieve him from personal liability and subject him to the liability attaching to his representative character only.[9] In England the amendment must be authorized by some matter of record. Even there a verdict was amended by the judge's notes and the affidavits of the jurors who rendered it,[10] and the *postea*, after a lapse of two years, by the judge's notes.[11]

§ 72. **Data for.**—In the United States, the authorities showing the *data* from which a judgment may be amended are contradictory. Some of the states have adopted the English practice; but a majority have adopted one more

[1] Reily *v.* Burton, 71 Ind. 118.
[2] Taylor *v.* Harwell, 65 Ala. 1.
[3] Smith *v.* Creditors, 59 Cal. 267.
[4] Conway *v.* Day, 92 Ind. 422.
[5] Houston *v.* Blythe, 71 Tex. 719.
[6] Cole's Will, 52 Wis. 591.
[7] Alvey *v.* Cahoon, 86 Va. 173.
[8] People's Bank *v.* McAuthor, 82 N. C. 107; Sweeny *v.* Delany, 1 Pa. St. 320; 44 Am. Dec. 136; Portis *v.* Talbot, 32 Ark. 218; Gates *v.* Bennett, 33 Ark. 475; Perry *v.* Adams, 83 N. C. 266; Evans *v.* Shafer, 86 Ind. 135; Hartley *v.* White, 94 Pa. St. 31; Bean *v.* Ayers, 70 Me. 421; Carroll *v.* Thompkins, 14 S. C. 223; Strickland *v.* Strickland, 95 N. C. 471; Forbes *v.* Navra, 63 Miss. 1; Pollard *v.* King, 62 Ga. 103; Welch *v.* Keene, 8 Mont. 305; Cowan *v.* Gentry, 32 S. C. 369.
[9] Adams *v.* Re Qua, 22 Fla. 250; Beers *v.* Shannon, 73 N. Y. 292; Conn *v.* Scruggs, 5 Baxt. 567; Gay *v.* Cheney, 58 Ga. 304; Boykin *v.* Cook, 61 Ala. 472; Atkins *v.* Sawyer, 1 Pick. 351; 11 Am. Dec. 188; Speed's Ex'r *v.* Hann, 1 T. B. Mon. 16; 15 Am. Dec. 78; Huggins *v.* Oliver, 21 S. C. 147; Spigener *v.* Farquhar, 82 Ala. 569.
[10] Coglan *v.* Elden, 1 Burr. 583.
[11] Doe *v.* Perkins, 3 Term Rep. 749.

liberal. In Mississippi the rule of the English cases was understood as excluding everything not a part of the record. On that ground the notes of the judge were deemed to be as incompetent to amend the record by as any other parol evidence.[1] In Indiana the court doubted whether any judge could, after the term, amend the entry of the judgment on the ground that it did not express his intention, when there was nothing in the record to amend by.[2] The law is now well settled in Alabama,[3] Georgia,[4] Kentucky,[5] Indiana,[6] Missouri,[7] Mississippi,[8] California,[9] Nevada,[10] and Iowa,[11] in conformity to the rule that no record can be amended but by matter of record. Undoubtedly, as in cases of application to enter judgment *nunc pro tunc*, the memoranda of the presiding judge upon the motion docket, and his written opinions, when required to be filed in the case, would generally be regarded as parts of the record.[12] In Wisconsin an amendatory order based upon the personal recollection of the judge, and conforming the judgment to that recollection, was sustained upon appeal.[13] In many of the states the practice has grown up of making a proposed amendment the subject of a petition and motion. The party applying is required to set forth the respect in which the record is defective, and to suggest the amendment with which he proposes to cure the defect. Notice of the motion must

[1] Dickson *v.* Hoff, 3 How. (Miss.) 165; Boon *v.* Boon, 8 Smedes & M. 318; Rhodes *v.* Sherrod, 8 Smedes & M. 97; Burney *v.* Royett, 1 How. (Miss.) 39.

[2] Boyd *v.* Blaisdell, 15 Ind. 73.

[3] Summersett *v.* Summersett's Adm'r, 40 Ala. 596; 91 Am. Dec. 494; Kemp *v.* Lyon, 76 Ala. 212.

[4] Pitman *v.* Lowe, 24 Ga. 429; Dixon *v.* Mason, 68 Ga. 478.

[5] Finnell *v.* Jones, 7 Bush, 359; Bennett *v.* Tiernay, 78 Ky. 580; Stephens *v.* Wilson, 14 B. Mon. 88.

[6] Makepeace *v.* Lukens, 27 Ind. 435; 92 Am. Dec. 263; Williams *v.* Henderson, 90 Ind. 577.

[7] Saxton *v.* Smith, 50 Mo. 490; State *v.* Clark, 18 Mo. 432; State *v.* Primm, 61 Mo. 166.

[8] Moody *v.* Grant, 41 Miss. 565; Russell *v.* McDougall, 3 Smedes & M. 234; Shackelford *v.* Levy, 63 Miss. 125.

[9] Morrison *v.* Dapman, 3 Cal. 255; Branger *v.* Chevalier, 9 Cal. 172; Swain *v.* Naglee, 19 Cal. 127; Hegeler *v.* Henckell, 27 Cal. 491; De Castro *v.* Richardson, 25 Cal. 49.

[10] Solomon *v.* Fuller, 14 Nev. 63.

[11] Giddings *v.* Giddings, 70 Iowa, 486.

[12] Gillett *v.* Booth, 95 Ill. 183; Sullivan Sav. Inst. *v.* Clark, 12 Neb. 578.

[13] Wyman *v.* Buckstaff, 24 Wis. 477. *Contra*, State *v.* Smith, 1 Nott & McC. 16.

be given to the adverse party, and an opportunity allowed him to appear and make a contest.[1] At the hearing, such evidence is received as would be competent in any other investigation. This practice is adopted either by express decisions or by tacit acquiescence in Massachusetts,[2] New Hampshire,[3] Maine,[4] Connecticut,[5] Ohio,[6] Illinois,[7] Arkansas,[8] Iowa,[9] and North Carolina,[10] and is sanctioned by the supreme court of the United States.[11] It is further recommended by its justness and its liberality. "The doctrine in this country, in reference to amendments of records, may be said to have crystallized into the following legal propositions, namely: That any error or defect in a record which occurs through the act or omission of the clerk of the court in entering, or failing to enter of record, its judgments or proceedings, and is not an error in the express judgment pronounced by the court in the exercise of its judicial discretion, is a mere *clerical error*, and amendable, no matter in how important a part of the record it may be; and when the error or defect is in respect to the entry of some judgment, order, decree, or proceeding, to which one of the parties in the cause was of right entitled, and, as a matter of course, according to law and established practice of the court, it will sometimes be presumed to have occurred through the misprision of the clerk, and will always be amendable if from other parts of the record, or from other convincing and satisfactory proofs, it can be clearly ascertained what judgment, order, or decree the party was entitled to."[12]

The law in relation to amendments, as stated by Lord

[1] Weed *v.* Weed, 25 Conn. 337; Means *v.* Means, 42 Ill. 50; Alexander *v.* Stewart, 23 Ark. 18; Hill *v.* Hoover, 5 Wis. 386; 68 Am. Dec. 70.

[2] Clark *v.* Lamb, 8 Pick. 415; 19 Am. Dec. 332; Rugg *v.* Parker, 7 Gray, 172.

[3] Frink *v.* Frink, 43 N. H. 508; 80 Am. Dec. 189.

[4] Inhabitants of Limerick, 18 Me. 183.

[5] Weed *v.* Weed, 25 Conn. 337.

[6] Hollister *v.* Judges, 8 Ohio St. 201; 70 Am. Dec. 100.

[7] Forquer *v.* Forquer, 19 Ill. 68.

[8] Arrington *v.* Conrey, 17 Ark. 100; King *v.* State Bank, 9 Ark. 188.

[9] Stockdale *v.* Johnson, 14 Iowa, 178.

[10] Galloway *v.* McKeithen, 5 Ired. 12; 42 Am. Dec. 153; State *v.* King, 5 Ired. 203.

[11] Matheson's Adm'r *v.* Grant's Adm'r, 2 How. 263.

[12] Doane *v.* Glenn, 1 Col. 456.

Coke, and as it undoubtedly existed until long after his time, was too harsh to successfully resist the march of legal reform, even in conservative England. As modified in that country, it is still too inconsistent with a liberal administration of the law to escape total overthrow in this country. The proposition that "the power to amend a record" is confined to cases where the record discloses that the entry "does not correctly give what was the judgment of the court" implies that ministerial authority is more sacred than judicial authority. This proposition is sustained by the averment that a record is of "uncontrollable verity." This verity is sufficiently respected when it is allowed to protect records from collateral assault; it is unduly indulged if it operate to the exclusion of truth, in every form and on every occasion. The object in every litigation is to obtain from some court a final determination of the rights of the parties. That determination is invariably what the judges direct, and not invariably what the clerks record. The power of the court to make the record express the judgment of the court with the utmost accuracy ought not to be restricted. Upon any suggestion of error, the court ought to be at liberty to ascertain the existence or non-existence of the alleged error, by any satisfactory evidence, and this rule prevails in some jurisdictions.[1] The record is made up in some cases after the term, and thus the opportunity of asking for corrections while it is still in the breast of the judge is never presented. In most cases the clerk acts from his recollection of what was done and said, as well as from loose, imperfect memoranda. Why, then, should the accuracy of his memory not be tested by the memory of other persons then present, and more especially by that of the judges, whom he may have imperfectly understood? Why may not the trial of an issue as to the correctness of a written memorial be brought to a more just and satis-

[1] In re Wight, 134 U. S. 136; Fay *v.* Wenzell, 8 Cush. 315; Rugg *v.* Parker, 7 Gray, 172.

factory conclusion by hearing all the proofs offered by both parties, tending to throw any light upon the controversy, than by confining the investigation to a mere inspection of such evidence as happens to be on or among the records in the case, — these records all confessedly liable to the same errors and omissions as the one sought to be reformed? Some of the courts profess to acquire their correctory power over their records solely by virtue of the English statutes of amendments and jeofails,[1] while others insist that it has a higher source and a wider application, and exists by virtue of high equity powers residing in the court and enabling it to compel its records to speak the truth.[2]

§ 72 a. **Notice of Application.** — Upon application to amend entries of judgments, the courts will not act *ex parte*, where it is not to be determined from a mere inspection of the record.[3] But if the amendment is to be made from the record alone, and the judgment, as proposed to be amended, is not different from what it would have been construed to be, independent of the amendment, notice is unnecessary. "No one's rights are affected by it, as the effect of the record is not changed. All who may have consulted the record, or acted upon the faith of it, must be presumed to have notice of all which the proper construction of the whole record discloses; in other words, of the effect of the record."[4] While, as we have stated, courts, when applications to correct their records are made, ordinarily require notice to be given parties whose interests may be affected, and thus afford them an opportunity to be heard in opposition to the amendment, we do not wish to be understood as asserting that the power of the court to act is dependent on such notice or hearing. Every

[1] Makepeace *v.* Lukens, 27 Ind. 435; 92 Am. Dec. 263.

[2] King *v.* State, 9 Ark. 188.

[3] Wallis *v.* Thomas, 7 Ves. 292; Radenhurst *v.* Reynolds, 11 Grant (U. C.) 521; Wooster *v.* Glover, 37 Conn. 315; McNairy *v.* Castleberry, 6 Tex. 286; Rockland Water Co. *v.* Pillsbury, 66 Me. 427; People *v.* McCutchen, 40 Mich. 244.

[4] Emery *v.* Whitwell, 6 Mich. 491.

court, as suggested in the previous chapter, has the right to make its records speak the truth, and may upon proper occasions, either upon its own motion or the motion of any party interested, whether upon or without notice to the parties to the action, correct its records until they contain a true history of its transactions.[1] If, however, an amendment is made to a judgment or decree in a matter of substance, whereby it is made to grant relief different from that granted when it was rendered, it is absolutely void as against a party having no notice of the application to thus amend it.[2]

§ 73. **Time within Which Amendments may be Made.**— The time within which an amendment of the entry of a judgment, order, or decree may be made has no limit. The laches of a party making an application for any kind of equitable relief may always be taken into consideration, and may sometimes afford a sufficient ground for denying him that which would have been yielded to his more prompt request, and this is true of applications to correct clerical defects in the entry of judgments or decrees; and in one instance a court of chancery refused to correct a mistake in the entry of a decree because the applicant had not moved until more than a year after his attention was called to the alleged error.[3] Delay in seeking the correction of a record is not of itself, we apprehend, ever a sufficient reason for refusing relief. "It is never too late to amend the record merely for the purpose of correcting a misprision of the clerk."[4] The general language of the authorities upon this subject is, that a record may be corrected at any time.[5] Therefore, the power of a

[1] Fay *v.* Wenzell, 8 Cush. 315; Petition of Inhabs. of Limerick, 18 Me. 183.

[2] Swift *v.* Allen, 55 Ill. 303.

[3] Rogers *v.* Rogers, 1 Paige, 188.

[4] Maus *v.* Maus, 5 Watts, 319; Cohn *v.* Scheuer, 115 Pa. St. 178; Smaltz *v.* Hancock, 118 Pa. St. 550.

[5] Sidener *v.* Coons, 83 Ind. 183; Dunham *v.* South Park, 87 Ill. 185; McClure *v.* Bruck, 43 Minn. 305; Lewis *v.* Ross, 37 Me. 230; 59 Am. Dec. 49; Crim *v.* Kessing, 89 Cal. 478; Galloway *v.* McKeethen, 5 Ired. 12; 13 Am. Dec. 153; Walton *v.* Peison, 85 N. C. 34; Rickman *v.* Rickman, 6 Lea, 483; Douglass *v.* Keehn, 78 Ind. 199; Vhelly *v.* Smith, 50 Iowa. 543; White *v.* Blake, 74 Me. 489; Nabers *v.* Meredith, 67 Ala. 333; Seiler *v.* Kentucky Northern Bank, 86 Ky. 125;

court retaining a record to amend it is not impaired by the fact that an appeal has been taken,[1] and has resulted in an affirmance of the judgment.[2]

§ 74. **Effect of Amendments.** — The observations in the preceding chapter, upon the effect of the entry of judgments *nunc pro tunc* as of the date of their rendition are equally applicable where such entry is not of a whole judgment, but is only a partial modification of it. When the entry is amended it is merely perfected evidence of what, in contemplation of law, existed from the time judgment was pronounced, and for most purposes the judgment will be given effect as if no error or omission had occurred in its original entry.[3] All persons who were not parties to the action, and who have acquired interests based upon the existing state of the record, acting in good faith, and being purchasers for valuable considerations, without notice, actual or implied, of the existence of the matters, evidence of which has been supplied by the amendment, are not prejudiced thereby,[4] unless they have been accorded a hearing and the court has determined that they have no such equities as entitle them to be exonerated from the effect of the amendment.[5] Generally, the effect of an amendment of a judgment or execution is to support proceedings already taken under

Pollard *v.* King, 62 Ga. 103; Brooks *v.* Stephens, 100 N. C. 297; Sanders *v.* Williams, 75 Ga. 283; Ecker *v.* New Windsor Bank, 64 Md. 292; Ex parte Henderson, 84 Ala. 36.

[1] Exchange Bank *v.* Allen, 68 Mo. 474; Freel *v.* State, 21 Ark. 226; Dow *v.* Whitman, 36 Ala. 604; Attorney-General *v.* White, Bunb. 283; Rew *v.* Barker, 2 Cow. 408; 14 Am. Dec. 515, and note; Richardson *v.* Mellish, 3 Bing. 346; 11 Moore, 119; 7 Barn. & C. 819; Ladiga S. M. Co. *v.* Smith, 78 Ala. 108; Exchange Bank *v.* Allen, 68 Mo. 474; Binns *v.* State, 35 Ark. 118; Sparrow *v.* Strong, 2 Nev. 362; Seymour *v.* Thomas, 81 Ala. 250.

[2] Roussett *v.* Boyle, 45 Cal. 64; Dreyfus *v.* Tompkins, 67 Cal. 339; Conway *v.* Day, 79 Ind. 318. *Contra,* Werborn *v.* Pinney, 76 Ala. 291.

[3] Adams *v.* Wiggins, 23 Fla. 13; Griffiths *v.* Sears, 112 Pa. St. 523; King *v.* Burnham, 129 Mass. 598.

[4] Auerbach *v.* Gieske, 40 Minn. 258; Duffey *v.* Houtz, 105 Pa. St. 96; Colman *v.* Watson, 54 Ind. 65; Indiana B. & W. R'y Co. *v.* Bird, 116 Ind. 217; 9 Am. St. Rep. 842; Kemp *v.* Cook, 18 Md. 130; 79 Am. Dec. 681; McCormick *v.* Wheeler, 36 Ill. 114; 84 Am. Dec. 388; Legon's Adm'r *v.* Rogers, 12 Ga. 281; Perdue *v.* Bradshaw, 18 Ga. 287.

[5] Remick *v.* Butterfield, 31 N. H. 70; 64 Am. Dec. 316.

it.[1] In Texas, however, this result does not follow; and if a sale has taken place under a judgment, its subsequent amendment will not aid the purchaser.[2] An amendment having been directed by the court, its action cannot be reviewed or avoided collaterally.[3] Upon an order being made to amend a judgment, it should be carried out, either by the erasure or interlineation of the original entry, until it correctly expresses the judgment rendered, or by the vacation of such entry and making a new entry *nunc pro tunc* of the judgment which the court finds was the one actually rendered in the first instance.[4]

§ 74 a. **Discretion of the Court.** — The expression frequently occurs in the decisions that a court exercises a discretionary power or authority in amending or refusing to amend its records, and that its action will not be reviewed in the appellate courts.[5] These expressions are probably misleading. In determining questions of fact, the action of trial courts is usually conclusive, and the higher courts rarely interfere with a verdict or decision supported by any competent evidence. If there is a reasonable doubt, upon the evidence, whether a judgment entry ought to be amended or not, the action of the court whose record it is in allowing or refusing the amendment, like its decision of any other question of fact respecting which the evidence is conflicting, is final. But surely it is not true that a court has an arbitrary discretion to amend or to refuse to amend its records. Every litigant must necessarily, unless he has forfeited it in some manner, have the right to have the final judgment and all other proceedings in the action correctly entered, and when correctly entered, to have such entry remain un-

[1] Freeman on Executions, sec. 71 a.

[2] Morris *v.* Balkham, 75 Tex. 111; 16 Am. St. Rep. 874; McKay *v.* Paris Exch. Bank, 75 Tex. 181; 16 Am. St. Rep. 884.

[3] Hamilton *v.* Seitz, 25 Pa. St. 226; 64 Am. Dec. 694.

[4] Jones *v.* Lewis, 8 Ired. 70; 47 Am. Dec. 330; McDowell *v.* McDowell, 92 N. C. 227; King *v.* State Bank, 9 Ark. 185; 47 Am. Dec. 739.

[5] Brown *v.* McCune, 5 Sandf. 224; Austin *v.* Jordan, 5 Tex. 130; Cohn *v.* Scheuer, 115 Pa. St. 178.

altered; and any action of the court impairing or denying this right should be subject to correction by appeal or by some other revisory proceeding; and that it is so subject is attested by the numerous decisions cited in this and the preceding chapter, all of which should be regarded as mere impertinences of the appellate courts, if the discretion of the lower courts is not a legal discretion to be exercised in conformity to well-settled principles of law.

## CHAPTER V.

### THE RECORD, OR JUDGMENT ROLL.

§ 75. Origin.
§ 76. Verity.
§ 77. The *postea*.
§ 78. What constitutes the roll.
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§ 75. **Origin.**—The judgment roll, or record, is so inseparably connected with the judgment itself as to require some notice in this work. In the primitive stages of our common law the pleadings were oral. The litigants appeared in court, and there carried on their legal altercations, the plaintiff stating the grounds which, in his opinion, entitled him to the interposition of the court; and the defendant resisting those statements, by denying either their sufficiency in law or their truthfulness, or by showing some fact depriving them of their ordinary force and effect. The process of statement and counter-statement continued until the court understood the point of difference, or in other words, until an issue was formed. During all this time an officer of the court was in attendance charged with the duty of making brief memoranda of the respective allegations of the parties and of the acts of the court upon a roll of parchment. Parchment was so early and so constantly used for this purpose that it came to be regarded as an essential and indispensable

part of the record. The manner and time in which the record was made up occasioned the use of words of the present tense, as the "plaintiff complains" and "brings suit," the defendant "comes and defends" and "prays judgment," "the jury come and say," and "the judgment of the court is, that it is considered." These words continued in use when by more modern practice the record became a subsequent instead of a contemporaneous memorial.

§ 76. **Verity.**—The record was kept in formal language, with great care and precision. Its formality and precision, together with its contemporaneous character, gave it great authenticity. It became exclusively admissible evidence of the matter properly included in it, and of such "uncontrollable credit and verity as to admit of no averment, plea, or proof to the contrary."[1] It became a mark of distinction to the class of courts in which it could be kept, and furnished the basis for a line of decisions which enhanced the dignity and importance of courts of record, and gave to their judgments and proceedings a *prima facie* credit and respect never accorded to those of courts not of record. The verity of a record applies to its date, and therefore evidence is not admissible to show that the date of the judgment as it appears in the judgment-book and docket is incorrect.[2]

§ 77. **The Postea.**—After the pleadings were written instead of oral, the record was continued. If an issue of fact was made by the pleadings, it was referred to some appropriate method of trial. The record was then made up, consisting of the *placita*, brief statement of the nature of the action, a transcript of the allegations of facts, time of appearance, the various acts of the court, and the award of trial. Fifty-three cases were brought to the

[1] Adams *v.* Betz, 1 Watts, 425; 26 Am. Dec. 79; Buck *v.* Holt, 74 Iowa, 294; Winchester *v.* Thayer, 129 Mass. 129.

[2] Ferguson *v.* Kumler, 25 Minn. 183.

supreme court of Illinois at one term, all of which were considered as liable to reversal, for containing no *placita*. This deficiency, it was held, could not be supplied by reference to bills of exceptions appearing in the record; because, without the *placita*, there was nothing to show any authority in the court to render judgment nor to *make a bill of exceptions*.[1] The history of the case after this is called the *postea*. It shows the day of trial, before whom the trial took place, the appearance or default, the summoning and the choice of the jury, and their verdict. The record was made compact and continuous by "continuances," or entries of the adjournment of the cause from time to time, by which the parties were temporarily dismissed and a day fixed for their subsequent appearance. After the return of the record with its *postea*, the case being ready for judgment, the allowance of the proper officer may be obtained, expressing generally that judgment is given and in whose favor. This is called "signing judgment." The next step is to put the judgment on record. If no trial has been had, a record is now made up for the first time. But if trial has been had, the whole proceedings, though already made up, are again entered on a roll of parchment. This proceeding is "entering the judgment." Though nominally the act of the court, the duty of seeing it done in proper form devolves upon the prevailing party. This last roll is deposited in the treasury of the court, and is known as the "judgment roll," and is also frequently styled "the record."[2]

§ 78. **Of What Composed.**—The verity conceded to the judgment roll applies to nothing which it is not the duty of the clerk to record.[3] Nothing can be made a matter of record by calling it by that name, nor by inserting it

[1] P. M. L. Co. *v.* Chicago, 56 Ill. 304.

[2] In relation to the matters contained in the three preceding sections, consult Stephen's Pleading, 25, 111; Burrill's Practice, 12, 16; 3 Bla. Com. 386, 387; Co. Lit. 60 a; Burrill's Law Dict. and Bouvier's Law Dict., tit. Record.

[3] Douglas *v.* Wickwire, 19 Conn. 489; Hahn *v.* Kelly, by Sawyer, J.; 34 Cal. 391; 94 Am. Dec. 742.

among the proper matters of record.[1] It is therefore exceedingly important to understand what is or is not a part of the judgment roll; what imports absolute verity; what will be considered in proceedings in the nature of writs of error; and precisely what has authority to speak for or against the judgment in a collateral proceeding. While the record is, in general terms, a history of the proceedings, many things done in the progress of a case are not necessarily nor ordinarily matters of record. It is to be regretted that the courts have been contented with peremptorily excluding many papers claimed to be parts of the record, but have rarely attempted to specify or describe those matters which possess an indefeasible claim to a place in the judgment roll. In Virginia the question, What is a common-law record? was answered thus: "It is the writ for the purpose of amending by, if necessary," all the pleadings, "papers of which profert is made or oyer demanded," papers submitted to the court by bills of exceptions, demurrers to evidence, or special verdict, and such papers as are inseparably connected with those so submitted, and the several proceedings at the rules or in court until the rendition of the judgment. These, and no other, are to be noticed by the court.[2] In the case of papers of which oyer is demanded, the rule laid down above must be limited to those instances where the record shows oyer to have been granted by the court or conceded by the party.[3] And the instrument will become part of the record if oyer be granted or conceded, though it be unsealed, and therefore not a paper of which oyer can be properly demanded.[4] Oyer of an instrument does not include oyer of an alleged assignment, nor will it make such assignment matter of record.[5] The writ or summons is

[1] Nichols *v.* Bridgeport, 27 Conn. 459; Kitchens *v.* Hutchins, 44 Ga. 620; Abbot *v.* Hachman, 2 Smedes & M. 510; Treat *v.* Maxwell, 82 Me. 76; Simmons *v.* Harris, 7 Baxt. 204.

[2] Mandeville *v.* Perry, 6 Call, 78.

[3] Cummins *v.* Woodruff, 5 Pike, 116; Clark *v.* Gibson, 2 Pike, 109; Hanly *v.* Real Estate Bank, 4 Pike, 598.

[4] Russell *v.* Drummond, 6 Ind. 216.

[5] Crary *v.* Ashley, 4 Pike, 203.

probably a part of the judgment roll,[1] but on this subject the authorities disagree.[2]

§ 79. **Matters not of Record.** — No general definition has been attempted by which to determine what are not matters of record. In one case the rule is stated as without exception that "no act *in pais* of any party to a suit can be made any part of the record except by bill of exceptions."[3] In another case, "all intermediate proceedings of an informal, collateral, and, so to speak, accidental and uncertain, character, not involving directly the merits of the case, but rather appertaining to modes of proceeding," are specified as forming no part of the judgment roll.[4] Among the matters which are not (unless made so by bill of exceptions or by consent, or by order of court) matters of record are all matters of evidence, written or oral,[5] including note,[6] bond,[7] or mortgage[8] filed in the case, and upon which suit is brought; an agreed statement of facts[9] not in nature of special verdict; all motions,[10] including motions to quash the writ,[11] to amend the pleadings, for extensions of time, for continuances, for bonds, for prosecution, for bills of particulars;[12] pleas stricken from the files;[13] notices of motions;[14] affidavits of claimants;[15] bonds for trial of rights of property;[16] affidavits in relation to conduct of jurors;[17] all affidavits taken during

[1] Montgomery *v.* Carpenter, 5 Pike, 264; Kibble *v.* Butler, 14 Smedes & M. 207. Pleadings and process are indispensable parts of the judgment roll: Vail *v.* Iglehart, 69 Ill. 332; Stevison *v.* Earnest, 80 Ill. 513.

[2] Childs *v.* Risk, 1 Morris, 439; Hays *v.* McKee, 2 Blackf. 11.

[3] Kibble *v.* Butler, 14 Smedes & M. 207.

[4] Nichols *v.* City of Bridgeport, 27 Conn. 459.

[5] Lovell *v.* Kelley, 48 Me. 263; Cunningham *v.* Mitchell, 4 Rand. 189; Clark *v.* Gibson, 2 Pike, 109; Cole *v.* Driskell, 1 Blackf. 17.

[6] Starbird *v.* Eaton, 42 Me. 569; Storer *v.* White, 7 Mass. 448; Pierce *v.* Adams, 8 Mass. 383.

[7] Cromie *v.* Van Nortwick, 56 Ill. 353.

[8] Kirby *v.* Wood, 16 Me. 81.

[9] Bank of Va. *v.* Bank of Chillicothe, 16 Ohio, 170.

[10] United States *v.* Gamble, 10 Mo. 457; Abbee *v.* Higgins, 2 Iowa, 535; Christy's Adm'r *v.* Myers, 21 Mo. 112.

[11] Hinton *v.* Brown, 1 Blackf. 429.

[12] Nichols *v.* Bridgeport, 27 Conn. 459.

[13] Walker *v.* Wills, 5 Pike, 166; Kelly *v.* Matthews, 5 Pike, 223; Chrisman *v.* Melne, 6 Ind. 487.

[14] Rich *v.* Hathaway, 18 Ill. 548.

[15] Kibble *v.* Butler, 14 Smedes & M. 207.

[16] Kirksey *v.* Bates, 1 Ala. 303.

[17] Mann *v.* Russell, 11 Ill. 586.

the progress of the cause;[1] memorandum of costs;[2] power of attorney to confess the judgment, and affidavit in relation to the death of the maker thereof;[3] report of judge of proceedings at the trial, reasons for his opinion in rendering judgment or in deciding application for a new trial;[4] rulings of the court upon the admission of evidence; the instructions to the jury; statement of facts made by the judge for the purpose of taking the advice of the appellate court;[5] and a ruling of the court upon an application to strike out a portion of the pleadings.[6]

§ 80. **Statutes.** — In several of the states the matters constituting the judgment roll are specified by statute. In most cases, however, the specification is sufficiently general and indistinct to create a necessity for judicial construction. In New York, "the clerk, upon entering final judgment, must immediately file the judgment roll, which must consist, except where special provision is otherwise made by law, of the following papers: The summons; the pleadings, or copies thereof; the final judgment and the interlocutory judgment, if any, or copies thereof; and each paper on file, or a copy thereof, and a copy of each order which in any way involves the merits or necessarily affects the judgment. If judgment is taken by default, the judgment roll must also contain the papers required to be filed, upon so taking judgment, or upon making application therefor, together with any report, decision, or writ of inquiry and return thereto. If judgment is taken after a trial, the judgment roll must contain the verdict, report, or decision; each offer, if any, made as prescribed in this act, and the exceptions or case then on file."[7] In Wisconsin the following papers are attached together and filed, and constitute the judgment roll:

[1] Bluzzard *v.* Phebus, 35 Ind. 284.

[2] Valentine *v.* Norton, 30 Me. 194; McArthur *v.* Starrett, 43 Me. 345.

[3] Hodges *v.* Ashurst, 2 Ala. 301; Magher *v.* Howe, 12 Ill. 379.

[4] Coolidge *v.* Inglee, 13 Mass. 50; Cathcart *v.* Commonwealth, 37 Pa. St. 108.

[5] Nichols *v.* City of Bridgeport, 27 Conn. 459.

[6] Feely *v.* Shirley, 43 Cal. 369; Moore *v.* De Valle, 28 Cal. 174; A. Nev. & S. Canal Co. *v.* Kidd, 43 Cal. 181.

[7] N. Y. Code Civ. Proc., sec. 1237.

"1. In case the complaint be not answered by any defendant, the summons and complaint, or copies thereof; proof of service, and that no answer has been received; the report, if any; and a copy of the judgment. 2. In all other cases, the summons, pleadings, or copies thereof; and a copy of the judgment, with any verdict or report; the offer of the defendant, exception, case; and all orders and papers in any way involving the merits and necessarily affecting the judgment."[1] The statute of Oregon[2] corresponds substantially with that of Wisconsin in this respect, except that in cases where answer is filed, the roll, in addition to the matters enumerated, in the Wisconsin code, must contain the proof of service, all orders relating to a change of parties, and instead of "all orders and papers," all journal entries, or orders involving the merits or necessarily affecting the judgment. In Ohio, Nebraska, Dakota, and Kansas, the clerk is required to make a complete record of every cause from the petition, process, return, pleadings, reports, verdicts, orders, judgment, and all material acts and proceedings of the court; but if items of account or copies of papers attached to the pleadings be voluminous, the court may order an abbreviation, or a pertinent description thereof. Except in Kansas, he is forbidden from recording the evidence.[3] In Georgia, the clerk must record in a well-bound book, within six months after the final determination of each cause, all proceedings relating thereto;[4] in Alabama, a statute, otherwise similar in this respect, excepts from the record subpœnas, affidavits for continuance, commissions to take testimony, evidence, and the execution.[5]

§ 81. **Construction of Codes.** — These statutes have not done much toward answering the question, What is *the*

[1] Wis. Code, sec. 191.
[2] Or. Code, sec. 272.
[3] Ohio Code, sec. 390; Neb. Code, sec. 446; Dakota Code, sec. 402; Kan. Code, secs. 415–418.
[4] Ga. Code, sec. 256.
[5] Ala. Code, sec. 767.

*record?* After enumerating the matters obviously indispensable to every judgment roll,— after being precise where precision had already been attained,— they employ terms whose signification is as unlimited as are the confines of space; whose application to the practical affairs of men must be as diverse as are the temperaments and the intellects of the judges by whom the application happens to be made,— who shall be able to determine with unerring accuracy what "proceedings and acts of the court are material"? what "papers, orders, or journal entries necessarily affect the judgment and involve the merits of the action"? Some of the matters excluded from the judgment roll under these statutes, and which, though included by the clerk as parts of the record, will be disregarded by the courts, are, motions, and the papers on which they are founded, together with the ruling of the court thereon;[1] matters of evidence, oral or written,[2] including notes[3] and mortgages[4] filed in the case, and constituting the cause of action, and proof of the filing of *lis pendens;*[5] memoranda of costs and notice of adjustment;[6] the affidavit requisite to authorize the taking of property in replevin;[7] affidavit and order of arrest;[8] proof of service when the defendant has answered or demurred;[9] bill of particulars;[10] pleadings amended or demurrer abandoned;[11] opinion of the judge;[12] affidavit used in support of a motion;[13] minutes made by the judge upon the trial docket.[14]

§ 82. **In California and Nevada.** — In California and Nevada, the law providing for the judgment roll is distinct and specific. The matters which may properly be inserted in it are so clearly enumerated as to leave no

[1] Cornell *v.* Davis, 16 Wis. 686; Demming *v.* Weston, 15 Wis. 236.
[2] Cord *v.* Southwell. 15 Wis. 211.
[3] Reid *v.* Case, 14 Wis. 429.
[4] Cord *v.* Southwell, 15 Wis. 211.
[5] Manning *v.* McClurg, 14 Wis. 350.
[6] S. & S. Plank Road Co. *v.* Thatcher, 6 How. Pr. 226.
[7] Kerrigan *v.* Ray, 10 How. Pr. 213.
[8] Corwin *v.* Freeland, 2 Seld. 560.
[9] Smith *v.* Holmes, 19 N. Y. 271.
[10] Kreiss *v.* Seligman, 8 Barb. 439.
[11] Brown *v.* Saratoga R. R. Co., 18 N. Y. 495.
[12] Thomas *v.* Tanner, 14 How. Pr. 426.
[13] Backus *v.* Clark, 1 Kan. 303; 83 Am. Dec. 437.
[14] Pennock *v.* Monroe, 5 Kan. 578.

necessity for doubt. Section 670 of the Code of Civil Procedure, recently adopted in the first-named state, re-enacts section 203 of the Practice Act, with one addition, that of the proof of service of summons when the answer has been filed. It enacts that the judgment roll shall consist, — 1. If no answer is filed by any defendant, of the complaint, summons, affidavit, or proof of service, memorandum of default, and copy of the judgment; 2. In other cases, of summons, proof of service, pleadings, verdict of jury, or finding of the court, commissioner, or referee, bills of exception taken and filed, copies of orders sustaining or overruling demurrers, copy of the judgment and of orders relating to change of the parties.

In Nevada, the roll, in the event of no answer being filed, is made up of the same materials as in California; in all other cases, it consists of nothing but the summons, pleadings, copy of judgment, and of any orders relating to a change of the parties.[1]

§ 83. **Construction.** — In California it has been determined by a majority of the judges of the supreme court, Justices Sanderson and Sawyer dissenting, that an answer stricken out is nevertheless entitled to a place in the judgment roll. "The phrase 'struck out,' as applied to a pleading, is figurative only. An order sustaining a demurrer to a pleading defeats or suspends, for a time, its legal effect in the action; and a successful motion to strike out an answer does no more. In either event, the pleading, as a document, remains in official custody." Such was the reasoning of the majority of the court. The minority said, with at least equal reason, "After the answer was stricken out, the document remained on the files as a part of the history of the case; but it was no longer, in legal contemplation, a pleading in the case."[2] In two

[1] Nev. Stats. 1869, p. 228, sec. 205. Cost bill is not part of the judgment roll: Kelly *v.* McKibben, 54 Cal. 192.

[2] Abbott *v.* Douglass, 28 Cal. 298, 299.

cases (*Braly* v. *Seaman*, 30 Cal. 610, and *Forbes* v. *Hyde*, 31 Cal. 342), the decisions were founded upon the assumption that in cases where no answer was filed, and the defendant was served by means of publication, the affidavit on which the order of publication was based, and also the order itself, were parts of the judgment roll. These decisions, so far as they affected this matter, were made upon the concession of counsel in the case, and without the consideration of the court. Neither the order nor the affidavit belongs in the judgment roll, and both will be disregarded if put there. The affidavit showing the fact of publication of summons in a newspaper, and the deposit of summons and complaint in the post-office, being "proof of service," must be attached to the roll.[1] The affidavit and notice upon which a motion was made,[2] and an order submitting a demurrer taken under advisement,[3] and the ruling of the court in striking out an answer,[4] are not parts of the record.

§ 84. **Interlocutory Judgments.** — "The statute does not expressly provide that an interlocutory judgment shall constitute a portion of the judgment roll; but as such judgments often determine the rights of the respective parties, there is a manifest propriety in inserting them in the judgment roll. We are of the opinion that an interlocutory judgment comes within the meaning of the statutory requirement that the judgment shall constitute a portion of the judgment roll."[5]

§ 85. **New Trial.** — The position which proceedings to obtain a new trial occupy in relation to the judgment roll is very different under our practice from that which they occupied toward the judgment roll at common law.

[1] Hahn *v.* Kelly, 34 Cal. 391; 94 Am. Dec. 391; Sharp *v.* Daugney, 33 Cal. 505; Galpin *v.* Page, 1 Saw. 321; but this decision was reversed by the supreme court in Galpin *v.* Page, 18 Wall. 350; 1 Cent. L. J. 491.

[2] Dimick *v.* Campbell, 31 Cal. 238.

[3] Anderson *v.* Fisk, 36 Cal. 625.

[4] Feely *v.* Shirley, 43 Cal. 369.

[5] Packard *v.* Bird, 40 Cal. 378.

There the motion for a new trial was made and disposed of before the judgment was entered. It therefore found its appropriate history in the same place with all the other proceedings taken prior to making up the record. But when the motion is made after the entry of the judgment, or though made before, is disposed of after, then it must possess a record of its own, independent of the judgment roll. The result of this is, that while the judgment roll passes out of the "breast of the judge and beyond his control by lapse of the term," the record of the new trial still remains *in fieri*, and will so remain, unaffected by the adjournment of the term, and susceptible of alteration and amendment, until the motion is finally granted or denied.[1]

§ 86. **States where No Record is Made up.** — In some of the states no record is made up, none being required by law.[2] In these states the files and journal entries probably stand in place of the record, and are entitled to similar verity.[3] In other of the states, as in Pennsylvania and Maryland, the keeping of records fell into great confusion and neglect. For a long period of time, little more was done by the prothonotaries, in most of the courts of these states, than to make such memoranda as would guide them is issuing executions, and as would have enabled them to draw up a formal judgment roll. Judgments, supported only by these informal memoranda, were, however, admitted in the highest courts. The loose practice, it was thought, had prevailed so long and so universally, had been so thoroughly acquiesced in by bench and by bar, and had been made the foundation on which so many private interests of great extent and variety were based, that the adjudications sufficiently though informally attested by it ought not to be ignored; that while the entries and memoranda gave *data* from which a rec-

[1] Spanagel *v.* Dellinger, 34 Cal. 476.
[2] Morrow *v.* Weed, 4 Clarke, 77, 127; 66 Am. Dec. 122; Norwell *v.* McHenry, 1 Mich. 227; Lothrop *v.* Southworth 5 Mich. 436.
[3] Thayer *v.* McGee, 20 Mich. 195.

ord as technical and prolix as any ever drawn in the court of king's bench could be readily constructed, they ought to be regarded as competent and satisfactory evidence of the judgment, and of such other judicial proceedings as were necessary to support it.[1]

§ 87. **Want of Judgment Roll.** — "The judgment does not depend upon the performance of the clerical duty of making up the judgment roll, or preserving the papers."[2] The papers constituting the roll are therefore proper evidence, and will support an execution, though they have never been attached together.[3] In New York, the rule that omissions in the roll do not invalidate the judgment has been applied where the omission consisted of the original summons,[4] of an order of reference,[5] of the copy of verdict,[6] of the answer of defendant.[7]

§ 88. **In Chancery**, all the proceedings, including the evidence, are either written or required to be reduced to writing. It is said, therefore, that everything so reduced to writing becomes a part of the record, and, as such, will be investigated by the appellate court.[8]

§ 89. **Replacing Lost Records.** — The rule that the record imports absolute verity, and is exclusively admissible evidence of the matters properly incorporated in it,[9]

[1] S. P. Co. *v.* Sickles, 24 How. 333; Cromwell *v.* Bank of Pittsburg, 2 Wall. Jr. 569. The opinion of Justice Grier in the last-named case is exceedingly interesting. It presents, in a graphic and somewhat humorous style, the history of judicial records in Pennsylvania, the brevity with which they were entered, the little importance attached to their preservation, and finally, the worthy character and eccentric orthography of the prothonotaries.

[2] Lick *v.* Stockdale, 18 Cal. 219; Tutt *v.* Couzins, 50 Mo. 152; Galpin *v.* Page, 1 Saw. 309; Bridges *v.* Thomas, 50 Ga. 378; Craig *v.* Alcorn, 46 Iowa, 560.

[3] Sharp *v.* Lumley, 34 Cal. 611; Newman's Lessee *v.* Cincinnati, 18 Ohio, 323; McGrath *v.* Seagrave, 2 Allen, 443; 79 Am. Dec. 797; Commonwealth *v.* Hatfield, 107 Mass. 231.

[4] Hoffnung *v.* Grove, 18 Abb. Pr. 14, 142.

[5] Martin *v.* Kanouse, 2 Abb. Pr. 390.

[6] Cook *v.* Dickerson, 1 Duer, 679.

[7] Renouil *v.* Harris, 2 Sandf. 641.

[8] Ferris *v.* McClure, 40 Ill. 99; Smith *v.* Newland, 40 Ill. 100.

[9] The rule that a judgment must be proved by the record doubtless yields when it must either be proved in some other way, or denied effect. In an action on a judgment rendered in another state, after the existence and loss of the judgment roll is established its contents may be proved by parol evidence: Bailey *v.* Martin, 119 Ind. 103. See also Ruby *v.* Van Valkenberg, 72 Tex. 459.

might occasion much mischief, if the courts did not possess and exercise a power, unaffected by lapse of time, to replace whatever may have been defaced, lost, or destroyed by accident, negligence, or wantonness. The making up of a new roll was ordered as a matter of course, in England, thirty years subsequent to the filing of the old one.[1] In New York, a new *nisi prius* record was allowed to be filed, and a *postea* indorsed thereon, the applicant showing by affidavit that, six years before, a verdict had been taken and judgment thereon given, and that the *nisi prius* record and issue roll could not be found.[2] In other states, the power of courts of record to supply, on proper proof, their own lost or destroyed records is affirmed to exist, independent of any statute, by virtue of their inherent powers "to minister ample justice to all persons according to law";[3] and such statutes as are enacted upon the subject are treated as cumulative, and therefore do not impair the power otherwise residing in the courts.[4] The practice in proceedings invoking this power should be by motion in the court whose record it is proposed to restore.[5] The plaintiff in the motion should give reasonable notice to the adverse party of the time and place when and where the application will be made,[6] accompanied by a copy of the matter he proposes to have enrolled as and for the lost record, and also accompanied by a copy of the affidavits intended to be used at the hearing. The defendant in the motion should have an opportunity of appearing and using counter-affidavits. If it appears to the court, at the hearing, that the record is lost or defaced, and what its contents were, it may then order a new roll to be made corresponding to the old one. The matter thus substi-

[1] Douglas *v.* Yallop, 2 Burr. 722.

[2] Jackson *v.* Hammond, 1 Caines, 496.

[3] Keen *v.* Jordan, 13 Fla. 327; Gammon *v.* Knudson, 46 Iowa, 455; Garibaldi *v.* Carroll, 33 Ark. 568; George *v.* Middough, 62 Mo. 549; Julian *v.* Ward, 69 Mo. 153; Hollister *v.* Judges, 8 Ohio St. 201; 70 Am. Dec. 100; Frink *v.* Frink, 43 N. H. 508; 80 Am. Dec. 189; Dubois *v.* Thomas, 14 S. C. 30.

[4] Bush *v.* Lisle, 86 Ky. 504; Lilly *v.* Larkin, 66 Ala. 110.

[5] Camden *v.* Bloch, 65 Ala. 236.

[6] Craddock *v.* Scarbourough, 54 Tex. 346.

tuted will henceforth be received in all courts, and given in all respects the same effect as though it were the original record.[1] Parol evidence must be admissible as a matter of necessity, for without it the contents of a lost record can rarely be shown.[2] In Indiana, a lost or destroyed judgment may be replaced or reinstated without reinstating the pleadings or establishing their contents.[3] It needs only a substantial copy of the record intended to be enrolled, to justify the court in allowing its substitution. It must also be consistent with the record remaining undestroyed.[4]

§ 89 a. **Chancery has No Jurisdiction to Supply.** — The supplying of a lost record is a matter of which the court where the record was made seems to have exclusive jurisdiction. A party, instead of making a motion in the court where the record had been made, filed a bill in chancery, praying that a record lost by fire might be reestablished. The court asserted that the power of supplying a new record, when the original was lost, pertained to courts of general jurisdiction, independent of legislation, but sustained a demurrer to this bill, on the following grounds: "The jurisdiction invoked by the complainant in the present case has not been exercised by any court of chancery in England (so far as we have been able to dis-

[1] Adkinson *v.* Keel, 25 Ala. 551; Doswell *v.* Stewart, 11 Ala. 629; McLendon *v.* Jones, 8 Ala. 298; 42 Am. Dec. 640; Pruit *v.* Pruit, 43 Ala. 73; Deshong *v.* Cain, 1 Duvall, 309; Pearce *v.* Thackeray, 13 Fla. 574; Russell *v.* Lillja, 90 Ill. 327.

[2] Lilly *v.* Larkin, 66 Ala. 110; Goetz *v.* Koehler, 20 Ill. App. 233.

[3] Cox *v.* Stout, 85 Ind. 422.

Note. — The power which enables courts to supply the entire record, if lost or destroyed after judgment, extends to supplying any of the pleadings or papers in civil cases prior to the judgment. But the court has no such power over an indictment. An indictment proceeds from the grand jury. The court has no creative or amendatory power over it. If it is defective, another grand jury must be called upon to supply the defects. Probably if after conviction and sentence the record were destroyed, the court might supply it for purposes of evidence, as in civil cases. But the defendant can be tried only on an original indictment; the court has no authority to establish a copy in the place of the original. If the original be lost, the only remedy for the prosecution is to have the defendant reindicted: Bradshaw's Case, 16 Gratt, 507; 86 Am. Dec. 722; State *v.* Harrison, 10 Yerg. 406; Ganaway *v.* State, 22 Ala. 772.

[4] Shiver *v.* Shiver, 45 Ala. 353; Bishop's Heirs *v.* Hampton, 19 Ala. 792.

cover with our limited means of examination), and the principles upon which the court takes jurisdiction in the case of lost instruments comes far short of embracing this case. The inherent power of courts to control their own records, and to supply losses therein, it seems, is antagonistic to the power of any other court to interfere and make records for them. By this proceeding, one court of special jurisdiction is invoked to take cognizance of and to supply to another court of general jurisdiction a record in lieu of one which has been destroyed. This power, once admitted, will place the records of the courts of common law at the mercy of the court of chancery, and might lead to absurd conflict between the law and equity side of the court over the records of the common law, one party imploring the conscience of the one to seize the power of the other, and control the history of its past action, and perhaps to compel the court of law to adopt and acknowledge as a fact a thing of which it may deny any knowledge, and against which action the other party may justly ask it to revolt and treat as a usurpation, because its own power is ample and adequate. There is nothing here requiring the exercise of the conscience of the court which may not be attained by a simple proceeding according to the course of the common law, and therefore chancery has no office to perform."[1]

§ 89 b. **Supplying Omissions in the Record.**—So much of the judgment roll as contains, or should contain, the history of the proceedings which have taken place in court is subject to amendment under the same circumstances and to the same extent as the judgment itself. A very important part of the judgment roll is that containing evidence of the service of process, or the taking of such other steps as are necessary to give the court jurisdiction over the person of the defendant; and it may hap-

[1] Keen *v.* Jordan, 13 Fla. 327; Fisher *v.* Sievres, 65 Ill. 99; Welch *v.* Smith, 65 Miss. 394.

pen that this part has been omitted from the roll, or has never been filed in court at all, or as filed and incorporated in the roll, is defective, and not sufficient to sustain the jurisdiction of the court, when attacked on appeal, or by motion to set it aside, or even when assailed in a collateral action or proceeding. Then the question arises whether the omission may be supplied, or the error corrected; and if so, by what means. As a general rule, an officer who has made a return of process will be permitted to amend such return at any time.[1] If the return upon the summons or other writ designed to give the court jurisdiction over the person of the defendant is omitted or incorrectly made, but the facts really existed which were required to give the court jurisdiction, the weight of authority at the present time permits the officer to correct or supply his return until it states the truth, though by such correction a judgment apparently void is made valid.[2] Though the proof of the service of process does not consist of the return of an officer, the like rule prevails. Thus if a summons has been published in the manner required by law, but the proof of publication found in the files of the court is defective, the court may, on the fact of due publication being shown, permit an affidavit to be filed showing the facts, and when so filed it will support the judgment as if filed before its entry.[3] If an appeal has been taken, the clerk of the court whose record has been thus corrected may be required to certify it to the appellate court, where it will be received and considered in its corrected form, and sustained if, as so corrected, it is free from error.[4]

[1] Malone *v.* Samuel, 3 A. K. Marsh. 350; 13 Am. Dec. 172, and note.

[2] Kirkwood *v.* Reedy, 10 Kan. 453; Hefflin *v.* McMinn, 2 Stew. 492; 20 Am. Dec. 58; Stotz *v.* Collins, 83 Va. 423; Shenandoah V. R. R. Co. *v.* Ashby's Trustees, 86 Va. 232; 19 Am. St. Rep. 891; Allison *v.* Thomas, 72 Cal. 562; 1 Am. St. Rep. 89. A *dictum* to the contrary may be found in Reinhart *v.* Lugo, 86 Cal. 395; 21 Am. St. Rep. 52.

[3] Foreman *v.* Carter, 9 Kan. 674; Burr *v.* Seymour, 43 Minn. 401; 19 Am. St. Rep. 245; Estate of Newman. 75 Cal. 213; 7 Am. St. Rep. 146; Frisk *v.* Reigelman, 75 Wis. 499; 17 Am. St. Rep. 198.

[4] Rew *v.* Barker, 5 Cow. 408; 14 Am. Dec. 515, and note; Bergin *v.* Rigg, 40 Ill. 61; 89 Am. Dec. 335; State *v.* Reid, 1 Dev. & B. 377; 28 Am. Dec. 572.

# CHAPTER VI.

## VACATING JUDGMENTS.

§ 90. Is a common-law power.
§ 91. Application may be made by either party, but generally not by third persons.
§ 92. Cases where third persons may apply.
§ 93. Power to vacate restricted in California.
§ 94. Writs of error *coram nobis* and *coram vobis*.
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§ 96. Vacation after lapse of the term — General principles controlling.
§ 97. Irregularities.
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§ 102. Merits and laches.
§ 103. Notice.
§ 104. Conditional vacation.
§ 104 a. Entry of second judgment.
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§ 90. **Is a Common-law Power.** — The power to vacate judgments was conceded by the common law to all its courts.[1] This power was exercised in a great variety of circumstances, and subject to various restraints. The practice in the different states is, in many respects, so conflicting that few rules can be laid down as universally applicable. One rule is, however, undoubted. It is, that the power of a court over its judgments, during the entire term at which they are rendered, is unlimited.[2] Every term continues until the call of the next succeeding term,

[1] Kemp *v.* Cook, 18 Md. 130; 79 Am. Dec. 681.

[2] Underwood *v.* Sledge, 27 Ark. 295; Ashley *v.* Hyde, 5 Ark. 100; State *v.* Treasurer, 43 Mo. 228; Nelson *v.* Ghiselin, 17 Mo. App. 663; McClellan *v.* Binkley, 78 Ind. 503; Kelty *v.* High, 29 W. Va. 381; Volland *v.* Wilcox, 17 Neb. 46; Fraley *v.* Feather, 46 N. J. L. 429; State *v.* Sowders, 42 Kan. 312; Rich *v.* Thornton, 69 Ala. 473. The fact that an appeal has been taken has been held not to destroy the power of the court to set aside the judgment appealed from at the term of its rendition: Leon *v.* Wettermath, 58 Tex. 125; Garza *v.* Baker, 58 Tex. 483. A probate court may vacate its order or decree: In re Marquis, 85 Mo. 615.

unless previously adjourned *sine die*.[1] Until that time the judgment may be modified or stricken out.[2] While the right to have a judgment set aside upon sufficient showing is secured to the applicant by the granting of an appeal in case of a denial of the right, the party whose judgment is vacated before the lapse of the term has no remedy. The action of the court in granting a motion to set aside a judgment is discretionary, and not to be reviewed in any appellate court.[3] The power of vacating a judgment must be exercised by *the court*, and not by a judge at chambers.[4] This power must be exercised solely by the judiciary. The legislature cannot set aside a judgment, nor can it empower any court to set aside a judgment which had been rendered and had passed beyond the control of the court prior to the passage of the act; because in doing so the legislature is exercising judicial functions not accorded to it by the constitution.[5] Therefore, a statute which declares "that in all cases where judgment heretofore has been, or hereafter may be, obtained in any court of record by means of perjury, or any fraudulent act, practice, or representation of the prevailing party, an action may be brought by the party aggrieved to set aside such judgment at any time within three years after the discovery of the facts constituting such fraudulent act, practice, or representation," must be restricted in its operation to judgments rendered after its enactment.[6]

§ 91. **Who may Apply for.** — An application to set aside a judgment may be made by either of the parties.

[1] Townsend *v.* Chew, 31 Md. 247.

[2] Doss *v.* Tyack, 14 How. 297; Taylor *v.* Lusk, 9 Iowa, 444.

[3] Bolton *v.* McKinley, 22 Ill. 203.

[4] Ross *v.* Grange, 27 U. C. Q. B. 306; Mearns *v.* Grand Trunk R'y Co., 6 U. C. L. J. 62.

[5] Arnold *v.* Kelley, 5 W. Va. 446; Merrill *v.* Sherburne, 1 N. H. 199; 8 Am. Dec. 52; Burch *v.* Newbury, 10 N. Y. 374; Lewis *v.* Webb, 3 Greenl. 326; Hill *v.* Town of Sunderland, 3 Vt. 507; State *v.* Wheeling and Belmont Bridge Co., 18 How. 421; Cooley's Const. Lim., 94; Griffin *v.* Cunningham, 20 Gratt. 31; United States *v.* Klein, 13 Wall. 128; White *v.* Herndon, 40 Ga. 493; De Chastellux *v.* Fairchild, 15 Pa. St. 18; 53 Am. Dec. 570; Taylor *v.* Place, 4 R. I. 324; Ratcliffe *v.* Anderson, 31 Gratt. 105; 31 Am. Rep. 716; Davis *v.* Menosha, 21 Wis. 491. *Contra*, Ex parte Bibb, 44 Ala. 140.

[6] Wieland *v.* Shillock, 24 Minn. 345.

The one who has been injured by the judgment may have it vacated, though it is in his favor, unless it was given at his instance, with knowledge on his part of its irregularity.[1] In fact, the propriety and necessity of striking out a judgment on application of him in whose favor it is are apparent. The judgment may be so irregular as to furnish no justification for any proceedings to execute it. If so, the party recovering it is entitled to have it set aside, to enable him to proceed against the defendant regularly.[2] Or through fraud, mistake, or irregularity, the defendant may procure a judgment to be entered for much less than the amount due. In this case, the plaintiff's right to have the judgment vacated is as obvious as though it were entirely in favor of the defendant. As a general rule, none but the parties to a judgment can have it set aside.[3] Every litigant, if an adult, is presumed to understand his own interests, and to be fully competent to protect them in the courts. He has the right to waive all irregularities in proceedings by which he is affected, and is entitled to exclusively decide upon the propriety of such waiver. To allow disinterested third persons to interpose in his behalf, and to undertake the management of his business, according to their judgment, would create intolerable confusion and annoyance, and produce no desirable result. To permit third persons to become interested after judgment, and to overturn adjudications to which the original parties made no objection, would encourage litigation, and disturb the repose beneficial to society. Therefore, if the defendant is the real as well as

[1] Downing *v.* Still, 43 Mo. 309. But the person applying must show that he was prejudiced by the judgment at its rendition: Hervey *v.* Edmunds, 68 N. C. 243; Hardin *v.* Lee, 51 Mo. 241. "Nothing can be clearer than that for defects or irregularities not affecting the jurisdiction of the court, and where no fraud or collusion is imputed, the remedy for such defects is given to the party alone, and that another judgment creditor is not entitled to have such proceedings or judgments set aside": Gere *v.* Gundlach, 57 Barb. 15.

[2] Herdic *v.* Woodward, 75 Pa. St. 479.

[3] Hinsdale *v.* Hawley, 89 N. C. 87; Merchants' & M. N. B. *v.* Harman, 80 Ga. 624; Coleman *v.* Case, 66 Iowa, 534; Parsons *v.* Johnson, 66 Iowa, 455; Walton *v.* Walton, 80 N. C. 26; Baugh *v.* Baugh, 37 Mich. 59; 26 Am. Rep. 495.

the nominal party affected, as long as he is satisfied with the judgment, all other persons must be.[1] None of his subsequent assignees can complain for him. He who purchases lands liable to a judgment lien cannot have the judgment vacated for irregularity, to avoid the lien. The best position he can occupy is that of a purchaser *cum onere*,[2] even though he offers to prove that he made a vain search for such liens before completing his purchase.[3] Third persons may sometimes have a judgment vacated on the ground that it is collusive, or that the cause of action on which it is based was fictitious; but they are not allowed to take advantage of errors or irregularities of proceeding.[4] If a judgment prejudicially affects two or more persons, either of them may move for its vacation, and if proper cause is shown, may obtain relief.[5] Whether this relief must necessarily be extended to all the parties will depend upon the further question whether the judgment must be regarded, under the circumstances of the case and the laws of the state, as an entirety.[6]

§ 92. **When Third Persons may Apply.** — The rule that none but parties to the judgment are permitted to interfere admits of exceptions, excluding from its operation persons not nominal parties to the action, but who are necessarily affected by the judgment, and who have equities entitled to be protected from its operation.[7] Thus if a party confesses judgment for too much, or not in conformity to the statute, it may be set aside by a judgment creditor; or if the defendant is a trustee about compromising the rights of his *cestui que use*, by confession, by default, by carelessness, or by a palpably mistaken view of his duty, the court, at the instance of the real

[1] Drexel's Appeal, 6 Pa. St. 272.
[2] Jacobs *v.* Burgwyn, 63 N. C. 196.
[3] Packard *v.* Smith, 9 Wis. 184.
[4] Hauer's Appeal, 5 Watts & S. 473.
[5] Storm Lake *v.* Iowa Falls, 62 Iowa, 218; Franks *v.* Lockey, 45 Vt. 395; Fall *v.* Evans, 20 Ind. 210; St. John *v.* Holmes, 20 Wend. 609; 32 Am. Dec. 603.
[6] *Post*, sec. 136.
[7] McClurg *v.* Schwartz, 87 Pa. St. 521; McWillie *v.* Martin, 25 Ark. 556; Ætna Ins. Co. *v.* Aldrich, 38 Wis. 107.

party in interest, will interpose. The comptroller of a city, having charge of its finances, has a right to have a judgment against the city set aside, upon showing that it was obtained by the collusion or consent of other city officials.[1] Doubtless, as intimated in the preceding section, where one of the parties is a nominal and not a real litigant, the rights of the latter may be protected by permitting him, in a proper case, to move for and obtain the vacation of a judgment prejudicial to his interests.[2] If a judgment operates as a lien, or otherwise affects the title to property, a transfer of such property may work a change in the parties, who may move to vacate the judgment. Thus in Nebraska, if a defendant by a transfer of property is placed in such a position that he can no longer be prejudiced by a judgment, he cannot procure it to be vacated.[3] On the other hand, such transfer, whether by conveyance or by the death of the defendant, may give his grantees, representatives, or successors in interest a right to move to vacate the judgment, as where he, having no longer any interest in the controversy, suffers default.[4] Even though the transfer is made after the entry of judgment, the grantee may move to vacate it on the ground that it is void because process was not served on the defendant.[5]

§ 93. **Law in California.** — In California the jurisdiction of a court over its judgments, except where otherwise expressly provided by statute, is, unless continued by some appropriate proceeding, exhausted at the close of the term. The process continues to be subject to the control of the court, but the judgment cannot be vacated on any account,[6] except that it is a nullity, "a dead limb on the

[1] Lowber *v.* Mayor of New York, 26 Barb. 262.

[2] Ætna Ins. Co. *v.* Aldrich, 38 Wis. 107; Mann *v.* Ætna Ins. Co., 38 Wis. 114.

[3] Powell *v.* McDowell, 16 Neb. 424.

[4] Plummer *v.* Brown, 64 Cal. 429; Knott *v.* Taylor, 99 N. C. 410; 6 Am. St. Rep. 547; Ladd *v.* Stevenson, 112 N. Y. 325; 8 Am. St. Rep. 748.

[5] People *v.* Mullan, 65 Cal. 396.

[6] Baldwin *v.* Kramer, 2 Cal. 582; Robb *v.* Robb, 6 Cal. 21; Bell *v.* Thompson, 19 Cal. 706; Shaw *v.* McGregor, 8 Cal. 521.

judicial tree, which should be lopped off."[1] This denial of the power of the courts to set aside their judgments has probably been made in no other state. On the contrary, this power has been fully recognized and liberally employed in England and in the United States, both at law and in equity. The remedy by application to the court in which judgment was pronounced seems in many states as complete as could be obtained by proceedings in chancery, and in nearly all the states has entirely superseded the remedy of *audita querela*, and by writ of *coram nobis*. As most of the authorities concede that a judgment may now be vacated on motion for any of the matters for which a writ of *coram nobis* or an *audita querela* would formerly lie, the consideration of the matters to which those remedies were successfully applied is material.

§ 94. **Writs of Error Coram Nobis** and *coram vobis* have frequently been treated as identical. The object sought by each writ is the same; but the method of seeking it is different. The former writ issued out of the court where the error was alleged to have occurred, and was returnable before the same court. It recited that "because in the record and proceedings, and also in the rendition of the judgment of a plea in our court *before us*, it is said a manifest error hath happened"; and it then directs the judges to inspect the "record and proceedings which before us now remain," and to do what of right ought to be done to correct that error. The latter writ was made returnable before some superior tribunal, and required the record and proceedings to be certified to such tribunal for its revisory action.[2] A judgment is not to be set aside because improperly entered, unless the showing is sufficient to authorize a writ of error *coram nobis*. If there is error in the process, or through the default or misprision of the clerk, it must be corrected in the same court. But this writ cannot reach error in matters of law. A plea in

[1] People *v.* Greene, 74 Cal. 400; 5 Am. St. Rep. 448.

[2] Camp *v.* Bennett, 16 Wend. 48.

abatement setting up the death of one of the parties, or that he is a slave or a lunatic, if overruled, estops the party who presented it from again urging those matters in the same court; for in this case it is evident that the court misapprehended the law, but understood the facts.[1] If, however, the proceedings are based upon facts presumed by the court to exist, as when one of the parties is insane, or is an infant or a *feme covert*, or has died before verdict, and the court, supposing such party to be alive and competent to appear as a litigant, renders judgment, it may be set aside by a writ of *coram nobis*.[2] But this writ does not lie to correct any error in the judgment of the court, nor to contradict or put in issue any fact directly passed upon and affirmed by the judgment itself. If this could be, there would be no end to litigation. Accordingly, where the judgment stated that defendant appeared and confessed, he was not allowed to controvert that statement, after the lapse of the term, for the purpose of vacating the judgment.[3] The writ of error *coram nobis* is not intended to authorize any court to review and revise its opinions; but only to enable it to recall some adjudication made while some fact existed which, if before the court, would have prevented the rendition of the judgment, and which, without any fault or negligence of the party, was not presented to the court. That defendant was summoned by a wrong name, and was unable to find the declaration, and therefore did not appear, does not entitle him to this writ. It is his own fault that he did not plead the misnomer or take judgment of *nolle prosequi*.[4] These writs have been generally, if not universally, superseded, and redress formerly obtained through their aid is now sought by motion.[5]

[1] Hawkins *v.* Bowie, 9 Gill & J. 428; Bridendolph *v.* Zellers's Ex'rs, 3 Md. 325.

[2] Kemp *v.* Cook, 18 Md. 130; 79 Am. Dec. 681; Mississippi & T. R. R. Co. *v.* Wynne, 42 Miss. 315; Hurst *v.* Fisher, 1 Watts & S. 438.

[3] Richardson's Ex'r *v.* Jones, 12 Gratt. 53.

[4] Brandon *v.* Diggs, 1 Heisk. 472.

[5] Pickett *v.* Legerwood, 7 Pet. 144; McKindley *v.* Buck, 43 Ill. 488; Life Ass'n *v.* Fassett, 102 Ill. 315.

§ 95. **Audita Querela.**—The proceeding by writ of *audita querela* is said to have commenced about the tenth year of the reign of Edward III. It gradually gave way in England, in most cases, to the more simple and equally efficient remedy by motion. It is, nevertheless, still used in some of the United States, and is sometimes sanctioned in cases where the writ of *coram nobis* seems peculiarly appropriate. The original purpose of the writ, and the one to which it is generally confined, is that of relieving a party from the wrongful acts of his adversary,[1] and of permitting him to show any matter of discharge which may have occurred since the rendition of the judgment.[2] It is in the nature of a bill in equity; and was invented, says Blackstone, "lest in any case there should be an oppressive defect of justice, where a party who hath a good defense is too late to make it in the ordinary forms of law." It is a judicial writ founded upon the record and directed to the court where the record remains.[3] It has the usual incidents of a regular suit, with its issues of law and of fact, its trial and judgment;[4] and the persons whose judgment is sought to be vacated must be made parties and given notice.[5] Besides being an appropriate remedy where some matter of discharge has arisen, the *audita querela* may be employed when a good defense to the action has accrued since the entry of the judgment, or where such defense, though existing prior to the judgment, was not brought to the attention of the court, on account of fraud or collusion of the prevailing party.[6] Where the defendant during the pendency of the suit paid the debt, and the plaintiff afterward took judgment, it was held

[1] Kimball *v.* Randall, 56 Vt. 558; Hawley *v.* Mead, 52 Vt. 343; Lovejoy *v.* Webber, 10 Mass. 103; Little *v.* Cook, 1 Aiken, 363; 15 Am. Dec. 698; Brackett *v.* Winslow, 17 Mass. 159.

[2] Powell's Appellate Proceedings, 377; Barker *v.* Judges, 4 Johns. 191.

[3] Poultney *v.* Treasurer, 25 Vt. 168; Harper *v.* Kean, 11 Serg. & R. 280; Warner *v.* Crane, 16 Vt. 79.

[4] Brooks *v.* Hunt, 17 Johns. 484.

[5] Gleason *v.* Peck, 12 Vt. 56; 36 Am. Dec. 329; Melton *v.* Howard, 7 How. (Miss.) 103; Troop *v.* Ricardo, 9 Jur., N. S., 887; 11 Week. Rep. 1014; 8 L. T., N. S., 757; 33 Beav. 122.

[6] Bryant *v.* Johnson, 24 Me. 304; Wetmore *v.* Law, 34 Barb. 515; Staniford *v.* Barry, 1 Aiken, 321; 15 Am. Dec. 692.

that this writ would lie.[1] It has also been applied for the purpose of vacating a judgment against an infant who defended without appointment of a guardian;[2] and a judgment against a lunatic whose guardian was not notified.[3] In Vermont, it seems to be employed with more frequency than elsewhere, and to answer as a specific for all sorts of mischiefs not otherwise provided against. It there has power to vacate a judgment rendered after a suit is discontinued by agreement, or by failure of the parties to appear for trial or for irregularity,[4] or in cases where a justice of the peace should have allowed an appeal, but refused to do so.[5] It is the proper remedy when two judgments have been rendered on the same cause of action, and one of them is paid.[6] It is not sustained by error of the court in a matter of law or of fact;[7] and is never permissible in a case where a writ of error is proper by the common law, though the right to such writ has been taken away by statute.[8] But a party having an opportunity of making his defense, or who is injured through his own neglect, cannot be relieved by *audita querela*.[9] Nor can a party, by *audita querela*, obtain relief from a judgment rendered against him on the unauthorized appearance of an attorney.[10] The fact that the judgment debtor had an equitable defense not cognizable at law does not entitle him to this writ;[11] nor can he by it obtain affirmative relief other than the setting aside of the judgment, and the relief incidentally following therefrom.[12] Proceedings by *audita querela* are in the nature of a direct rather than of a collateral attack, and therefore the party seeking relief may contradict the record.[13] A judgment

[1] Lovejoy *v.* Webber, 10 Mass. 101.
[2] Starbird *v.* Moore, 21 Vt. 529.
[3] Lincoln *v.* Flint, 18 Vt. 247.
[4] Jenney *v.* Glynn, 12 Vt. 480; Pike *v.* Hill, 15 Vt. 183.
[5] Edwards *v.* Osgood, 33 Vt. 224; Harriman *v.* Swift, 31 Vt. 385.
[6] Bowne *v.* Joy, 9 Johns. 221.
[7] Lamson *v.* Bradley, 42 Vt. 165; School District *v.* Rood, 27 Vt. 214.
[8] Spear *v.* Flint, 17 Vt. 497.
[9] Thatcher *v.* Gammon, 12 Mass. 270; Griswold *v.* Rutland, 23 Vt. 324; Avery *v.* United States, 12 Wall. 304; Barker *v.* Walsh, 14 Allen, 175.
[10] Abbott *v.* Dutton, 44 Vt. 551; Spaulding *v.* Swift, 18 Vt. 214.
[11] Garfield *v.* University, 10 Vt. 536.
[12] Foss *v.* Witham, 9 Allen, 572.
[13] Folsom *v.* Connor, 49 Vt. 4; Paddleford *v.* Bancroft, 22 Vt. 529; Hill *v.* Warren, 54 Vt. 73.

debtor residing out of the state and who has not been served with process may, by aid of this writ, have an execution set aside which has been taken out by a creditor, without first filing a bond required by statute.[1] An *audita querela*, like a motion to set aside a judgment, is only available in behalf of one who was prejudiced by the judgment at its rendition. If the party does not seek to avoid the judgment, his subsequent alienee will not be allowed to interfere with it.[2] A party who has been discharged in insolvency, if he suffers default to be taken against him, is not entitled to have the judgment set aside for the purpose of pleading his discharge.[3] As a general rule, whenever *audita querela* would lie at common law, relief may now be obtained on motion. But perhaps in some of the states and in England, if the right to relief is questionable, or if the facts of the case are disputed, the party moving may be compelled to have recourse to this writ.[4] In a majority of the states it is undoubtedly superseded by the more summary method of application by motion upon notice to the adverse party.[5]

§ 96. **Vacating Judgments after Lapse of Term — General Principles Controlling.** — All judgments regularly entered must become final at the end of the term. After that time the courts which entered them have no power to set them aside,[6] unless some proceeding for that object has been commenced within the term and has been con-

[1] Folan *v.* Folan, 59 Me. 566; Dingman *v.* Meyers, 13 Gray, 1; Harmon *v.* Martin, 52 Vt. 255.

[2] Beard *v.* Ketchum, 8 U. C. Q. B. 523.

[3] Faxon *v.* Baxter, 11 Cush. 35.

[4] Giles *v.* Nathan, 5 Taunt. 558; Lister *v.* Mundell, 1 Bos. & P. 427; Symonds *v.* Blake, 4 Dowl. P. C. 263; 2 Cromp. M. & R. 416; 1 Gale, 182; Baker *v.* Ridgway, 2 Bing. 41; 9 Moore, 114; Wardell *v.* Eden, 2 Johns. Cas. 258.

[5] McMillan *v.* Baker, 20 Kan. 50; Longworth *v.* Screven, 2 Hill (S. C.) 298; 27 Am. Dec. 381; McDonald *v.* Falvey, 18 Wis. 571; Smock *v.* Dade, 5 Rand. 639; 16 Am. Dec. 780; Dunlap *v.* Clements, 18 Ala. 778; Chambers *v.* Neal, 13 B. Mon. 256; Huston *v.* Ditto, 20 Md. 305.

[6] Bronson *v.* Schulten, 104 U. S. 410; Trawick *v.* Trawick, 67 Ala. 271; Moore *v.* Hennant, 90 N. C. 163; Hall *v.* Paine, 47 Conn. 429; Clemmons *v.* Field, 99 N. C. 400; Memphis & C. R. R. Co. *v.* Johnson, 16 Lea, 387; Morgan *v.* Hayes, Breese, 126; 12 Am. Dec. 147; Wood *v.* Payea, 138 Mass. 61; Rogers *v.* Watrous, 8 Tex. 62; 58 Am. Dec. 100; Rawdon *v.* Rapley, 14 Ark. 203; 58 Am. Dec. 370.

tinued for hearing, or otherwise remains undisposed of.[1] In those cases in which the court afterward interferes to vacate or annul a judgment, the interference can only be justified on the ground that the judgment was procured in such a manner as to indicate that it was not intended to be authorized by the court, or if authorized by the court, that it is nugatory for want of jurisdiction over the parties.[2] The interests of society demand that there should be a termination to every controversy. Courts have no power, after fully deliberating upon causes, and ascertaining and settling the rights of parties, to add clauses to their judgments authorizing the losing party to apply at a subsequent term to have the judgment against him set aside. If a vacillating, irresolute judge were allowed to thus keep causes ever within his power, to determine and redetermine them term after term, to bandy his judgments about from one party to the other, and to change his conclusions as freely and as capriciously as a chameleon may change its hues, then litigation might become more intolerable than the wrongs it is intended to redress. Leave granted in one term to move to set aside a judgment at the next term is void.[3] It is doubtful whether after the lapse of a term after a judgment has been regularly entered, the court does not lose jurisdiction over the action so that the parties cannot by their consent confer power upon it to set aside the judgment and redetermine the controversy;[4] and whether this is so or not, the parties cannot by their stipulation make it the duty of the court to vacate the judgment and retry the cause.[5] The want of power to vacate judgments after the lapse of the term at which they were regularly entered exists in the appellate as well as in the subordinate courts.[6] The

[1] Green *v.* P. W. & K. R. R. Co., 11 W. Va. 685; Windett *v.* Hamilton, 52 Ill. 180.

[2] Cook *v.* Wood, 24 Ill. 295; Ashby *v.* Glasgow, 7 Mo. 320; State Sav. Inst. *v.* Nelson, 49 Ill. 171; Merle *v.* Andrews, 4 Tex. 200.

[3] Hill *v.* City of St. Louis, 20 Mo. 584.

[4] Little Rock *v.* Bullock, 6 Ark. 282; Anderson *v.* Thompson, 7 Lea, 259.

[5] Kidd *v.* McMillan, 21 Ala. 325.

[6] Donnell *v.* Hamilton, 77 Ala. 610.

power of courts to set aside judgments after the lapse of the term is subject to settled principles, and the action of courts, if not authorized by those principles, is susceptible of review and reversal in the appellate courts.[1] It must be confessed, however, that while those principles may be, and probably are, sufficiently defined in each state, they vary in material respects in the different states. One state withholds this power altogether, others confine it to judgments rendered contrary to the practice or without the authority of the court, while in some it is applied within very broad limits, and seems to be kept, like reserved troops at a battle, for desperate emergencies not otherwise to be overcome.[2] Some courts regard judgments by default or upon confession as always within their control, and therefore as subject to vacation at any time, if, in their opinion, notwithstanding the lapse of time, that relief ought to be granted.[3]

§ 97. **For Irregularity.** — "Irregular and improper conduct in procuring judgment to be entered is a well-settled ground for vacating it. This has become one of the settled remedies where the impropriety or irregularity has not been induced by the fault or negligence of the judgment debtor."[4] A judgment is said to be irregular whenever it is not entered in accordance with the practice and course of proceeding where it was rendered.[5]

[1] Huntington *v.* Finch, 3 Ohio St. 445; Henderson *v.* Gibson, 19 Md. 234.

[2] In Massachusetts, where a wrong verdict had been reported to the court through mistake, and a judgment was entered thereon, the court said: "We think it clear that the court had power at a subsequent term, in the exercise of a judicial discretion, on satisfactory proof that an erroneous entry had been made on the docket through mistake, to order the case to be brought forward for the purpose of vacating the previous erroneous order, and making such disposition of the case as the rights of the parties might require": Capen *v.* Inhabitants of Stoughton, 16 Gray, 365. See also Stickney *v.* Davis, 17 Pick. 169; Wolfe *v.* Davis, 74 N. C. 597.

[3] Breden *v.* Gilliland, 67 Pa. St. 36; King *v.* Brooks, 72 Pa. St. 363; Powell *v.* Jopling, 2 Jones, 400; Wilson *v.* Tarbert, 3 Stew. 296; 21 Am. Dec. 637; Hall *v.* Jones, 32 Ill. 38.

[4] Huntington *v.* Finch & Co., 3 Ohio St. 445; Downing *v.* Still, 43 Mo. 309; Doan *v.* Holly, 27 Mo. 256; Harkness *v.* Austin, 36 Mo. 47; Craig *v.* Wroth, 47 Md. 281; O'Hara *v.* Baum, 82 Pa. St. 416.

[5] Dick *v.* McLaurin, 63 N. C. 185; Davis *v.* Shaver, 1 Phill. (N. C.) 18; 91 Am. Dec. 92. A judgment inadvertently entered by the clerk will be stricken out: Merrick *v.* Baltimore, 43 Md. 219.

When the writ was not returned until two months after the return day, and the judgment was entered as of the same day, it was set aside as irregular, on the ground that if entered before the return, it was unauthorized; and if entered subsequent to its date, it was a false record.[1] Judgments prematurely entered by default[2] and those entered after the death of a party[3] are irregular, and may be stricken out on motion. Taking judgment upon a warrant of attorney without filing a copy is, in Ohio, such irregularity as authorizes the vacation of the judgment after the term.[4] Where the duty of plaintiff required him to give notice of the taxing of costs, and he failed to do so, the judgment was set aside, and he was compelled to give a notice at his own expense.[5] The irregularities which have been treated as sufficient to justify the vacations of judgments are very numerous, and it is not possible to prescribe any test by which, in all jurisdictions, to determine whether or not a particular irregularity is such as to require the vacation of a judgment. When the irregularity does not go to the jurisdiction of the court, its action will be largely controlled by the promptness with which the application is made, and by the consideration whether or not the irregularity is one which could have operated to the prejudice of the applicant.[6] Generally, judgments will not be set aside after the lapse of the term, on account of mere technical defects, such, for instance, as that the name of the defendant was not correctly stated in the summons,[7] or that the time at which he was to appear was imperfectly described, where he could have had no doubt as to the time intended.[8] The follow-

[1] Graff *v.* M. & M. Trans. Co., 18 Md. 364.

[2] Mailhouse *v.* Inloes, 18 Md. 329; Browning *v.* Roane, 9 Ark. 354; 50 Am. Dec. 218; Branstetter *v.* Rives, 34 Mo. 318; Walters *v.* Walters, 132 Ill. 467.

[3] Bowen *v.* Troy Mill Co., 31 Iowa, 460; Crossman's Appeal, 102 Pa. St. 137; Knott *v.* Taylor, 99 N. C. 511; 6 Am. St. Rep. 547; Holmes *v.* Honie, 8 How. Pr. 384.

[4] Knox Co. Bank *v.* Doty, 9 Ohio St. 505; 75 Am. Dec. 479.

[5] Fenton *v.* Garlick, 6 Johns. 288.

[6] Stancill *v.* Gay, 92 N. C. 455.

[7] Jones *v.* San Francisco Sulphur Co., 14 Nev. 172.

[8] Roberts *v.* Allman, 106 N. C. 391.

ing are instances of the vacation of judgments for irregularity: Where judgment was entered as by default when there was a demurrer on file and not disposed of;[1] where an answer had been filed and judgment was, notwithstanding, entered by default;[2] where creditors who were made co-defendants did not serve their answers on the parties complaining, nor give any notice of the trial, and where, also, judgment was entered by default against a decedent without making his representatives parties;[3] where the cause was tried by a judge when the parties were entitled to jury trial;[4] where there was a failure to give notice of the trial;[5] where judgment was taken against a garnishee without serving notice of the garnishment on the principal debtor;[6] where the judgment was entered by the clerk without authority;[7] where judgment on a joint contract was entered against a part only of the defendants liable thereon.[8] Defects in the process, or in its service, constitute the most unquestionable ground for the vacation of judgments after the lapse of the term. If there is an entire absence of service of process, and this fact appears by the record, or by such evidence as, under the practice of the court where the judgment is entered, is competent, it may be vacated on motion at any time.[9] Though process was served in some manner or was defective in form, and the judgment is not therefore absolutely void, it will generally be vacated on motion, as where the summons was served on Sunday, though the return declared it to have been served on Monday,[10] or was left at defendant's residence with a person who did not reside there,[11] or the notice of an application for the probate of a will was published but twice, when it was directed to be published three times,[12] or the summons was served on the return day.[13]

[1] Norman *v.* Hooker, 35 Mo. 366; Oliphant *v.* Whitney, 35 Cal. 25.
[2] Knowles *v.* Fritz, 58 Wis. 216.
[3] Edwards *v.* Woodroof, 90 N. Y. 396.
[4] Cowles *v.* Hayes, 69 N. C. 406.
[5] People *v.* Bacon, 18 Mich. 247.
[6] Searle *v.* Fairbanks, 80 Iowa, 307.
[7] Wharton *v.* Harlan, 68 Cal. 422.
[8] Mullendove *v.* Silvers, 34 Ind. 98.
[9] Smith *v.* Rollins, 25 Mo. 408; Allen *v.* Rogers, 27 Iowa, 106; *post*, sec. 98.
[10] Smith *v.* Noe, 30 Ind. 117.
[11] Heffner *v.* Gunz, 29 Minn. 108.
[12] In re Charlebois, 6 Mont. 373.
[13] Simcock *v.* First Nat. Bank, 14 Kan. 529.

§ 98. **Nullities.**—A judgment which is a nullity on account of being rendered against a corporation that does not exist will be vacated by the court which entered it.[1] And, as a general rule, all void judgments will be so treated.[2] In a case in South Carolina, the court asked itself this pertinent question: "Should the court whose process is abused by an attempt to enforce a void judgment interfere, for its own dignity and for the protection of its officers, to arrest further action?" and answered itself by saying: "Certainly, on proper application."[3] In New York, judgment was vacated on motion, on the ground that the summons was served by publication, and the record did not, on its own face, show sufficient facts to confer jurisdiction upon the court.[4] In most of the states, a judgment will be set aside, though procured according to the ordinary forms of practice, upon showing a want of jurisdiction over the person of the judgment debtor.[5] This has been done in cases of appearance made by unauthorized attorneys, upon showing by affidavits the want of authority in those persons, and that the defendant did not know of their action in his name when it occurred. The courts have acted in these cases without inquiring whether the attorneys were solvent or insolvent;[6] but in this respect they probably disregarded the current of the authorities. While it is universally conceded that a judgment void for want of jurisdiction over the person of the defendant may be vacated on motion, irrespective of the lapse of time,[7] there is, as we shall hereafter show, a wide

[1] City of Olney *v.* Boyd, 50 Ill. 453.

[2] Forman *v.* Carter, 9 Kan. 674; 12 Am. Law Rep. 60; Hervey *v.* Edmunds, 68 N.C. 243; Winslow *v.* Anderson, 3 Dev. & B. 9; 32 Am. Dec. 651; Outhwite *v.* Porter, 13 Mich. 533; Pantall *v.* Dickey, 123 Pa. St. 431.

[3] Mills & Co. *v.* Dickson, 6 Rich. 487.

[4] Hallett *v.* Righters, 13 How. Pr. 43.

[5] Shuford *v.* Cain, 1 Abb. 302; In re College Street, 11 R. I. 472; Cotton *v.* McGehee, 54 Miss. 621; Pettus *v.* McClanahan, 52 Ala. 55.

[6] Yates *v.* Horanson, 7 Rob. (N. Y.) 12; McKelway *v.* Jones, 17 N.J. L. 345; Kenyon *v.* Shreck, 52 Ill. 382; Latimer *v.* Latimer, 22 S. C. 257; Vilas *v.* Plattsburgh etc. R. R. Co., 123 N. Y. 440; 20 Am. St. Rep. 771; Bradley *v.* Welch, 100 Mo. 258; Winters *v.* Means, 25 Neb. 274; 13 Am. St. Rep. 489; Woods *v.* Dickinson, 7 Mackey, 301.

[7] People *v.* Greene, 74 Cal. 103; 5 Am. St. Rep. 448; People *v.* Mullan, 65 Cal. 396; Ladd *v.* Mason, 10 Or. 308; People *v.* Pearson, 76 Cal. 403; Ex parte Crenshaw, 15 Pet. 119; Mills *v.* Dickson, 6 Rich. 487; State *v.* Wau-

divergence of opinion as to what judgments are void for this reason, and as to whether a motion to vacate a judgment is a direct attack upon it so as to warrant the reception of evidence not found in the record, and perhaps inconsistent with that which is to be found there. Where an appellate court has deliberately determined that it had jurisdiction over the subject-matter of an action, it will perhaps refuse, at a subsequent term, though convinced that its former conclusion was erroneous, to vacate its judgment for want of such jurisdiction.[1] Unless this exception be sustainable, we believe the decided preponderance of authority justifies, or rather requires, a court, on motion being made to vacate its judgment because it was without jurisdiction over the person or the subject-matter, to inquire whether such was the fact, and if so, to grant the relief sought. It is true that the supreme court of California has very recently apparently decided that a motion to vacate a judgment cannot be granted unless the record upon its face discloses a want of jurisdiction, and that though the record shows that the service of summons was apparently constructive, and was made under circumstances not warranting such service, yet that a judgment cannot be vacated if it contains a recital that the defendants "were regularly served with process as required by law,"[2] though in previous cases the same court had unquestionably authorized the reception of evidence not found in the judgment roll, and had declared that motions to vacate judgments were direct and not collateral attacks.[3] In Alabama, the rule is also enforced that before a judgment can be vacated after the term, for want of jurisdiction, its invalidity must appear on the face of the record.[4] When a motion to vacate a judgment, on

paca Co. B., 20 Wis. 640; Wharton *v.* Harlan, 68 Cal. 442; Noreman *v.* Carter, 9 Kan. 674; Hanson *v.* Wolcott, 19 Kan. 207; Bruce *v.* Strickland, 47 Ala. 192; Baker *v.* Barclift, 76 Ala. 414; Crane *v.* Barry, 47 Ga. 476; Olney *v.* Harvey, 50 Ill. 453; 99 Am. Dec. 530.

[1] State *v.* Waupaca Co. Bank, 20 Wis. 640.

[2] People *v.* Harrison, 84 Cal. 607; People *v.* Goodhue, 80 Cal. 199.

[3] People *v.* Mullan, 65 Cal. 396; People *v.* Pearson, 76 Cal. 400.

[4] Pettus *v.* McClanahan, 52 Ala. 55.

the ground that defendant had never been served with process, is made, it is doubtless incumbent on the moving party to clearly prove his case;[1] but to hold that he must establish it by the record is to deny him relief in all cases in which relief is necessary; for if a judgment record proclaims its own invalidity, it must be denied effect everywhere, and it is of little or no consequence whether it is formally set aside or not. Generally, though there is a return showing that process was served, this return may be contradicted on motion to vacate the judgment and the motion granted, if notwithstanding the return the court is convinced that it had not acquired jurisdiction over the defendant.[2] So far as the cases, or any of them, affirm that a motion to vacate a judgment is a direct attack thereon, and may therefore be supported by evidence not admissible on a collateral attack, we think them erroneous. Judgment having been entered in an apparently legal manner, and the jurisdiction of the court not being retained by any motion or proceeding taken either during the term or within the time allowed by some statute, the court loses all control over the action and the parties thereto, and its subsequent interference to vacate its judgment can only be justified on the ground that the judgment might be avoided in any collateral proceeding, and for that reason to permit it to stand unvacated may probably cause innocent parties to purchase titles based thereon, or to be otherwise deluded by it. If the defendant has not been served with process, or otherwise brought within the jurisdiction of the court, he has been denied due process of law. Whether he has been so denied or not is a question to be determined by the national courts, and their determination, when known, should be and generally is followed by state courts.[3] If the judgment cannot be enforced without depriving the defendant of

[1] Hunt *v.* Childress, 5 Lea, 247.

[2] Hanson *v.* Wolcott, 19 Kan. 208; Carr *v.* Commercial Bank, 16 Wis. 50; Heffner *v.* Gunz, 29 Minn. 108; Stancill *v.* Gay, 92 N. C. 455; Vilas *v.* Plattsburgh etc. R. R. Co., 123 N. Y. 440; 20 Am. St. Rep. 771; Parker *v.* Spencer, 61 Tex. 155.

[3] Belcher *v.* Chambers, 53 Cal. 635.

due process of law, it should not be enforced at all, but treated as void, and because void, vacated on motion, and thereby deprived of its falsely assumed form of a judicial determination. A judgment entered while an order of reference is unexecuted is an irregularity, and will therefore be vacated at any time.[1] And a judgment against an infant who did not appear by guardian stands on the same footing.[2] Where the court ordered a case to stand over and to be continued for argument, and the clerk, by mistake, entered judgment on the verdict, and issued execution, the judgment was set aside and the execution quashed at the next term, on motion.[3]

§ 99. **For Fraud.** — The maxim "that fraud vitiates everything" is applicable to judgments. Whether the maxim is to be given effect on motions to vacate them is more doubtful. In many instances judgments have been vacated for fraud in their procurement, upon motions made after the lapse of the term at which they were entered;[4] but we judge the safer practice is to require relief to be sought by suits in equity.[5] Even in the case of decrees of divorce they have been vacated on motion for fraud, nor have the courts hesitated to do so even after marriages have been contracted in reliance upon the fraudulent decree, and one of the parties was innocent of all complicity in or knowledge of the fraud.[6] On the

[1] Stacker *v.* Cooper Circuit Court, 25 Mo. 401.

[2] Keaton *v.* Banks, 10 Ired. 381; 51 Am. Dec. 393.

[3] United States *v.* McKnight, 1 Cranch C. C. 84.

[4] Cannan *v.* Reynolds, 5 El. & B. 301; Phillipson *v.* Earl of Egremont, 6 Ad. & E., N. S., 587; McIntosh *v.* Commissioners, 13 Kan. 171; In re Fisher, 15 Wis. 511; Dial *v.* Farrow, 1 McMull. 292; 36 Am. Dec. 267; Taylor *v.* Sindall, 34 Md. 38; Pyett *v.* Hatfield, 15 Lea, 473.

[5] Syme *v.* Trice, 96 N. C. 243; Fowler *v.* Poor, 93 N. C. 466; Sharp *v.* Danville M. & S. W. R. R. Co., 106 N. C. 308; 19 Am. St. Rep. 533.

[6] Olmstead *v.* Olmstead, 41 Minn. 297; Young *v.* Young, 17 Minn. 181; Allen *v.* McClellan, 12 Pa. St. 328; 51 Am. Dec. 608. The courts in Massachusetts also exercise the power of vacating judgments after the lapse of the term. In a recent case a decree of divorce was vacated upon petition addressed to the court, showing that a decree had been obtained at a former term against petitioner on false testimony, on a libel of which she had no notice, and of which actual knowledge was kept from her by the other party, and that the jurisdiction of the court was founded on a false allegation of domicile: Edson *v.* Edson, 108 Mass. 590; 11 Am. Rep. 393.

other hand, there are courts which deny the right to vacate decrees of divorce for fraud, though under the circumstances they would order the decrees vacated if they did not involve the marital *status* of parties.[1]

§ 100. **Vacating Decrees.** — In relation to decrees, there seems to be no doubt that the power of the court to discharge the enrollment and open the decree never terminated unless there had been a regular trial on the merits. The general rule "that a decree once enrolled cannot be opened except by bill of review, or by an original bill for fraud, is subject to well-founded exceptions, arising in cases not heard upon the merits, and in which it is alleged that the decree was entered by mistake or surprise, or under such circumstances as shall satisfy the court, in the exercise of a sound discretion, that the decree ought to be set aside.[2] The decree in such cases being by default, the cause of the default can never be the subject of inquiry until the decree has been pronounced, and generally not until after the term has passed. Without the exercise of this power in the court to vacate the enrollment, a party against whom a decree had been enrolled by mistake or surprise, and without any laches on his part, would be without redress. A bill of review would be of no avail, because his claim to relief is not based on error apparent on the face of the decree, nor on account of newly discovered evidence; and unable to charge fraud in obtaining the decree, he would be unable to reverse it on that ground. Accordingly, it is laid down by the most eminent elementary writers, and fully sustained by the adjudged cases, that when a case has not been heard on the merits the court will, good cause being shown, exercise a discretionary power of vacating an enrollment, and giving the party an opportunity of having his case discussed." The fact that the merits of the case were never

[1] Parish *v.* Parish, 9 Ohio St. 534; 75 Am. Dec. 482; Lewis *v.* Lewis, 15 Kan. 181.

[2] Cawley *v.* Leonard, 28 N. J. Eq. 467; Smith *v.* Alton, 22 N. J. Eq. 572.

before the court seems to be the controlling one in all applications for the exercise of this discretionary power. Therefore, where the decree is perfectly regular so far as regards the appearance of the parties, and is in conformity with the general practice, it may be vacated at the discretion of the court, upon a showing of mistake, accident, or surprise, or of negligence of the solicitor, by which the decision on the merits was prevented;[1] or that the merits of the case were not presented to the court, on account of the guardian *ad litem* appointed for an infant, not sufficiently understanding the matters constituting his defense.[2] Principles about as ample and liberal as those recognized at equity, upon application to vacate decrees, seem to be applied to judgments in the courts of Maryland and Michigan. The courts of the former state vacate judgments upon clear proof of fraud, surprise, or irregularity,[3] while those of the latter state relieve, upon motion, irrespective of the question whether the term has passed, all who have suffered from inability to make their defense.[4] And in England, little, if any, more stringency is applied to applications made after than to those made during the term. In *Cannan* v. *Reynolds*,[5] the court set aside a judgment by default on application of plaintiff, on the ground of mistake on his part in including demands in the judgment which were due from others than the defendants, and in excluding equal amounts due from defendants, whereby, if the judgment was not set aside, the plaintiffs would be prejudiced. The court thought it had power to set aside a judgment, at any time, in its discretion; and stated that it was in the habit of doing so every day, even after execution executed, and without inquiring whether it was in term or not. In Illinois, a

[1] 2 Daniell's Chancery Practice, 1230; 2 Maddox's Chancery Practice, 466; Herbert *v.* Rowles, 30 Md. 271; Kemp *v.* Squires, 1 Ves. Sr. 205; Millspaugh *v.* McBride, 7 Paige, 509; 34 Am. Dec. 360; Erwin *v.* Vint, 6 Munf. 267; Carter *v.* Torrance, 11 Ga. 654; Hargrave *v.* Hargrave, 9 El. & E. 14; Benson *v.* Vernon, 3 Bro. P. C. 626; Robson *v.* Cranwell, 1 Dick. 61; Beekman *v.* Peck, 3 Johns. Ch. 415; Bennett *v.* Winter, 2 Johns. Ch. 205.

[2] Curtis *v.* Ballagh, 4 Edw. Ch. 635.

[3] Hall *v.* Holmes, 30 Md. 558.

[4] Loree *v.* Reeves, 2 Mich. 133; Hurlburt *v.* Reed, 5 Mich. 30.

[5] 5 El. & B. 301.

judgment confessed by attorney was vacated on the ground that usury entered into the consideration upon which the confession was made. This action was said to be warranted by the practice in England, though not by that of some of the United States.[1]

§ 101. **Error as a Ground for.** — But neither a final judgment nor a final decree, pronounced upon a hearing on the merits, can be set aside after the term, upon motion, for any errors into which the court may have fallen. The law does not permit any judicial tribunal to exercise a revisory power over its own adjudications, after they have, in contemplation of the law, passed out of the "breasts of the judges."[2] That a judgment was rendered upon default, upon considering evidence offered by plaintiff, for a sum much larger than that evidence warranted, is not a ground for vacating the judgment. The matter complained of is attributable to an error of the court, which might have happened if the defendant had been present at the trial.[3] Neither is an error or misapprehension of the parties, nor of their counsel, any justification for vacating the judgment, although the counsel consented to it because deceived by fraudulent misrepresentations of third parties,[4] or failed to attend the trial on account of a misapprehension as to the time of holding court.[5]

§ 101 a. **Vacating Judgments against Minors.** — Acting under the assumption that the remedy by motion to vacate judgments has taken the place of that by writ of error *coram nobis*, and that it may accomplish all the purposes formerly realized by that writ, and that among these was the correcting of errors of fact, the courts of some of

[1] Fleming *v.* Jencks, 22 Ill. 475.

[2] Charman *v.* Charman, 16 Ves. Jr. 115; Assignees *v.* Dorsey, 2 Wash. C. C. 433; Bank of U. S. *v.* Moss, 6 How. 31; Peake *v.* Redd, 14 Mo. 79; McBride *v.* Wright, 75 Wis. 306; Brett *v.* Myers, 65 Iowa, 274; State *v.* Horton, 89 N. C. 581; Loomis *v.* Rice, 37 Wis. 262; Brown *v.* Bennett, 55 Ga. 189.

[3] Green *v.* Hamilton, 16 Md. 317; 77 Am. Dec. 295.

[4] Murphy *v.* Merritt, 63 N. C. 502.

[5] Harbor *v.* Pacific R. R. Co., 32 Mo. 423.

the states have, on motion, after the lapse of the term, vacated judgments against minors when the fact of their minority was not known to the court when it rendered judgment, and they did not appear by guardian.[1] If this remedy be conceded to be proper, it is obvious that when minors are regularly served with process they must seek redress within a reasonable time after attaining their majority, otherwise their delay will preclude their obtaining relief.[2]

§ 101 b. **Exceptional Instances of Vacating Judgments.** — Various instances have occurred in which judgments have been vacated after the expiration of the term at which they were entered, when there was no irregularity in their entry, and in which the action of the court in vacating them can hardly be justified except on the broad assumption that it has a right, upon motion, to prevent any wrong which might otherwise be perpetrated by the aid of its judgments. Among these may be mentioned the vacation of a judgment because it imposed a fine which the governor had afterwards remitted;[3] because the judgment was by default, and payments made by the defendant had not been allowed;[4] or was upon a note apparently barred by the statute of limitations;[5] or was confessed by warrant of attorney in consideration of the stifling of a prosecution for forgery.[6] The judgments vacated in these instances were, generally, either by default or upon confession, and their vacation probably proceeded upon the ground that judgments of the classes to which they belonged were always within the control of the court. Frequently, facts arise after the entry of a judgment which render its execution clearly inequitable, and where there

[1] Powell *v.* Gott, 13 Mo. 458; 53 Am. Dec. 153; Randalls *v.* Wilson, 24 Mo. 76; Levy *v.* Williams, 4 S. C. 515; Townsend *v.* Cox, 45 Mo. 401. See Dig. Stats. Ark. 1884, sec. 3909; Rev. Stats. Ohio 1880, sec. 5354.

[2] Eisenmenger *v.* Murphy, 42 Minn. 84; 18 Am. St. Rep. 493.

[3] Chisholm *v.* State, 42 Ala. 527.

[4] United States *v.* Millinger, 17 Blatchf. 451.

[5] Ellinger's Appeal, 114 Pa. St. 505.

[6] Bredin's Appeal, 92 Pa. St. 241; 37 Am. Rep. 677.

is no mode of procuring redress by appeal or motion for new trial, or other revisory proceeding. The remedy for such cases at the common law, as we have heretofore shown, was by *audita querela*. Though that remedy has fallen into disuse, its purpose may, in many jurisdictions, be accomplished by motion to vacate the judgment when facts occurring since its rendition make its enforcement inequitable.[1] Hence, where a judgment was based upon a previous judgment, and the latter was subsequently reversed, it was held that relief might be obtained from the second judgment by motion to vacate it.[2]

§ 102. **Merits, and Want of Laches.** — The most worthy object attained by the granting of motions to vacate judgments is that of allowing a full investigation of the matters in controversy, in order that a disposition of the case, according to the merits, may be made. Whenever that object does not appear to be the one sought, an application based on mere irregularity of proceeding will be treated with no favor.[3] The rules will be strictly applied, and any laches shown against the moving party will prove fatal to his desires.[4] But what delay necessarily amounts to laches is uncertain. In an early case in New York, eight days' notice of trial being given, when the defendant was entitled to fourteen days' notice, he treated it as void, and judgment was given against him. A subsequent motion based on the irregularity, made after the intervention of a full term, was considered too late.[5] In the

[1] Weaver *v.* Mississippi and Rum River Boom Co., 30 Minn. 477; Chisholm *v.* State, 42 Ala. 527.

[2] Etna Ins. Co. *v.* Aldrich, 38 Wis. 107; Heckling *v.* Allen, 15 Fed. Rep. 196.

[3] But in Missouri, if a judgment be "irregularly obtained against the provisions of a statute or the rules of a court, a party is entitled to have it set aside without showing any merits": Doan *v.* Holly, 27 Mo. 256. See also Hughes *v.* Wood, 5 Duer, 603, note. If the judgment be void for want of jurisdiction, the court will set it aside without requiring any showing of merits: Hanson *v.* Wolcott, 19 Kan. 207.

[4] Kerr *v.* Bowie, 3 U. C. L. J. 150; Cagger *v.* Gardiner, 1 How. Pr. 142; Ammerman *v.* State, 98 Ind. 165; McCormick *v.* Hogan, 48 Md. 404; Sanderson *v.* Dox, 6 Wis. 164; Altman *v.* Gabriel, 28 Minn. 132; Foster *v.* Hauswrith, 5 Mont. 566; Williams *v.* Buchanan, 75 Ga. 789; Lee *v.* Basey, 85 Ind. 543; Nicholson *v.* Nicholson, 113 Ind. 131.

[5] McEvers *v.* Markler, 1 Johns. Cas. 248.

same state, a third of a century later, an application based on an irregularity, in giving too short a notice of an inquisition on a writ of inquiry, made after lapse of two special terms, was refused, because "as this was an attempt to deprive the plaintiff of his judgment on the ground of a mere irregularity, the defendant would be held to the strictest rules of proceeding, and having been guilty of laches in making his motion, he was not entitled to be heard."[1] This decision has been indorsed in Wisconsin, by holding that a short notice being sufficient to put a party upon inquiry, he must ascertain whether his adversary proceeds to judgment upon it; that a motion to set aside such judgment, there being no pretense of merits, must be made at the same term, unless he can show some good cause for his delay; and that where defendant waited more than two months, and until the expense of advertising real estate for sale had been incurred, he waived the irregularity.[2] The defendant must not, according to some of the authorities, take any step in the case after the irregularity occurs, or it will be deemed a waiver. Thus where an appeal was taken because no notice of the motion for judgment was served, and the appellate court declined to interfere, on the ground that the appropriate remedy was by motion to vacate the judgment, and the defendant then applied in the court where judgment was rendered to have it set aside, the taking of the appeal was deemed to be such a proceeding as precluded him from taking advantage of the irregularity.[3] It is said in England that the true rule is, that if there be an irregularity, the party suffering by it is not bound to have it set aside in any specific time; that he may reasonably presume that his adversary, discovering the error, will abandon the defective proceeding. But if the adversary take one step more, showing that he has not

[1] Nichols *v.* Nichols, 10 Wend. 560.
[2] Etna Life Insurance Co. *v.* McCormick, 20 Wis. 265.
[3] Jenkins *v.* Esterly, 24 Wis. 340.

abandoned his process, then the movement to have the irregularity set aside must be commenced.[1] An infant having confessed judgment by attorney, and permitted it to stand until six years after coming of age, the court held that his application to vacate it came too late.[2] If the ground of the motion is, that the court did not have jurisdiction of the defendant, and that the judgment is therefore void, the court will act irrespective of lapse of time, if it finds that the facts are such as to sustain the motion.[3]

§ 103. **Notice of Application.** — During the term at which a judgment was rendered, the power of the court over it is so absolute that it may vacate it on its own motion, and whether on its own motion or not, without requiring notice to be given to the party to be affected by its order.[4] At the close of the term, the parties are dismissed *sine die*, and can no longer be regarded as being in court. Proceedings taken after that time, to set aside a judgment, must therefore be upon notice to all the parties affected,[5] and the order of a court acting in the absence of such notice will be reversed upon appeal.[6] Notwithstanding the retainer of an attorney ordinarily terminates with the entry of final judgment, a motion to vacate the judgment may be served on him, and when so served, gives the court jurisdiction to dispose of the motion.[7]

[1] Fletcher *v.* Wells, 6 Taunt. 191.

[2] Kemp *v.* Cook, 18 Md. 130; 79 Am. Dec. 681.

[3] Vilas *v.* Plattsburgh etc. R. R. Co., 123 N. Y. 440; 20 Am. St. Rep. 771; Feikert *v.* Wilson, 38 Minn. 341; Thompson *v.* Thompson, 73 Wis. 84; Stocking *v.* Hanson, 35 Minn. 207; Wharton *v.* Harlan, 68 Cal. 422; Koonce *v.* Butler, 84 N. C. 221; *ante*, sec. 88.

[4] Rich *v.* Thornton, 69 Ala. 473; Desribes *v.* Wilmer, 69 Ala. 25; 44 Am. Rep. 501; Lake *v.* Jones, 49 Ind. 297.

[5] Lane *v.* Wheless, 46 Miss. 666; Coleman *v.* McAnulty, 16 Mo. 173; 57 Am. Dec. 229; Burnside *v.* Ennis, 43 Ind. 411; Bajourine *v.* Ramelli, 34 La. Ann. 554. Hence if property has been sold under the judgment, the court, before hearing a motion to vacate it, will require notice to be given the purchaser: Molloy *v.* Batchelder, 69 Mo. 503; Hettrick *v.* Wilson, 12 Ohio St. 136; 80 Am. Dec. 337; Nuckolls *v.* Irwin, 2 Neb. 60.

[6] Vallejo *v.* Green, 16 Cal. 160.

[7] Branch *v.* Walker, 92 N. C. 87; Lee *v.* Brown, 6 Johns. 132; Doane *v.* Glenn, 1 Col. 454; Beach *v.* Beach, Dakota (1889).

§ 104. **Conditional Vacation.** — Where the circuit court made an order setting aside a judgment upon payment of the costs which had accrued, the neglect of plaintiff's counsel to insist upon their payment impliedly waived the condition upon which the judgment was to be vacated, and he could not therefore proceed upon the judgment as still in force.[1] In Alabama, an order that a cause stand dismissed unless plaintiff, within one hundred and twenty days, answer certain interrogatories is not considered a final order. It was said that the matter still remained in the control of the court; that it was competent for the court at a subsequent term to modify or vacate the order; that the order could not become effective until the happening of the contingency was judicially ascertained at the next term.[2] The courts of the same state hold that an order setting aside a judgment upon payment of costs is a conditional order, dependent upon the payment being made, and that it may be set aside at any subsequent term prior to the compliance with its condition.[3] In this opinion they are probably in error.[4]

§ 104 a. **The Entry of a Second Judgment** may follow the vacation of the first in proper circumstances. The party in whose favor a judgment has been entered irregularly may, after it has been vacated, proceed as if it had never been rendered, and in due time and upon proper proceedings obtain a valid judgment.[5] But the entry of a second judgment has been held not to operate as a vacation of the first. In a case arising in Nebraska, the record showed the entry of two judgments in the same action at different dates. Speaking of this state of facts, the court said: "But as there can be but one final judgment in a

[1] Ransom *v.* City of New York, 20 How. 581.

[2] Ex parte McLendon, 33 Ala. 276.

[3] Willis *v.* Bank of Mobile, 19 Ala. 141. And generally, if relief be granted upon certain conditions, the party must comply with the condition, or the grant of relief is inoperative: Hartman *v.* Olvera, 49 Cal. 101.

[4] Dana *v.* Gill, 5 J. J. Marsh. 242; 20 Am. Dec. 255; Johnson *v.* Taylor, 3 Smedes & M. 92.

[5] Moore *v.* Haskins, 66 Miss. 496.

cause, we have the question, Which is *the* judgment in the case? That seems to be not a very difficult question. When a judgment is once entered of record it must stand as the judgment until it is vacated, modified, or disposed of by some means provided by law; entering additional judgment entries is not one of them. A case brought regularly into court is presumed to be attended at regular terms of court by the attorneys having it in charge; and all proceedings of the court in reference to them, in the absence of fraud, will be binding on the parties, whether present or not. But when judgment is entered they may cease their attention. The further proceedings in the case, by petition to vacate or modify the judgment, or on error to this court, must be on proper notice, provided by statute."[1]

§ 104 b. **The Effect of an Order Vacating a Judgment** may be considered,—1. With reference to the persons against whom the order is sought to be asserted; and 2. With reference to the causes on account of which the order was entered. So far as third persons are concerned, it seems clear that their acts, done by authority of a judgment which was not void, but voidable only, may be justified under the judgment, notwithstanding its subsequent vacation, except when they have been given notice of the motion, and the court, after giving them an opportunity to be heard, has determined that it should be set aside, notwithstanding their interests may be affected.[2] With the parties to the suit this rule is not always applicable; and whether it is applicable or not depends on the causes producing the vacation. The judgment may have been regularly and properly entered, and its subsequent vacation may have been in the exercise of mercy toward the defendant. In such case, as the plaintiff has been guilty of no neglect or misconduct, he may no doubt

[1] Nuckolls *v.* Irwin, 2 Neb. 60.

[2] Schmidtt *v.* Niemeyer, 100 Mo. 207. See, however, Lane *v.* Kingsberry, 11 Mo. 402.

justify all his acts done under the judgment before it was set aside. But where the order of vacation is made because of some fault or misconduct of the plaintiff in procuring the original judgment, a different rule may be invoked. "If the judgment or execution has been set aside for *irregularity*, the party cannot justify under it, for that is a matter in the privity of himself and his attorney; and if the sheriff or officer, in such case, join in the same plea with the party, he forfeits the benefit of his defense. The sheriff or officer, however, may justify under an *irregular* judgment as well as an erroneous one, for they are not privy to the irregularity; and so as the writ be not void, it is a good justification, however irregular, and the purchaser will gain a title under the sheriff."[1] The case of a judgment set aside for irregularity differs materially from that of one reversed upon appeal. In the latter case, the error for which the judgment is ultimately avoided is imputed to the court, and the parties are not left without protection for the acts which they have done, based upon the judgment, and upon their confidence in the correctness of the decision of the court. But a judgment obtained irregularly, and against law or the practice of the court, is tainted with vices liable to result in its destruction, and for which the party practicing the irregularity is alone responsible. When, on account of these vices, the judgment is vacated, the party guilty of the irregularity seems to be as completely without any means of justification as though no judgment had ever been entered.[2]

[1] Tidd's Practice, 1032.

[2] Young *v.* Bircher, 31 Mo. 139; Simpson *v.* Hornbeck, 3 Lans. 54; Barker *v* Braham, 3 Wils. 368; Coleman *v.* McAnulty, 16 Mo. 173; 57 Am. Dec. 229; Turner *v.* Felgate, 1 Lev. 95; Allen *v.* Huntington, 2 Aiken, 249; 16 Am. Dec. 702; Nelson *v.* Guffey, 131 Pa. St. 273.

## CHAPTER VII.

### OF VACATING JUDGMENTS UNDER STATUTES, ON ACCOUNT OF MISTAKE, INADVERTENCE, SURPRISE, OR EXCUSABLE NEGLECT.

§ 105. Summary of statutes.
§ 106. Discretion is subject to review.
§ 107. Party recovering may move to vacate.
§ 108. Affidavit of merits.
§ 109. May contradict the record, but not the affidavit of merits.
§ 110. New motion may be regarded as continuation of an old one.
§ 111. Lenience of the New York courts.
§ 111 a. Fraud and perjury.
§ 112. Neglect of attorney or agent.
§ 113. Mistake.
§ 114. Excusable neglect.
§ 115. Inexcusable neglect.
§ 115 a. Surprise, unavoidable casualty, and misfortune.

§ 105. **Summary of Statutes.** — The authority of the courts over regular judgments has, in several of the states, been extended beyond the term in certain cases specified by statutes. The most liberal of these statutes authorize "the court, at its discretion, and on such terms as may be just, at any time within one year after notice thereof, to relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect."[1] In other states this provision has been substantially copied, except that the period in which an aggrieved party is authorized to apply for relief is computed from the rendition of the judgment instead of "from notice thereof."[2] In several of the states a judgment may in a specified time, though the term has passed, be relieved from "for unavoidable casualty or misfortune preventing the party from defending or prosecuting," or for "fraud

[1] Sanborn and Berryman's Wis. Rev. Stats., sec. 2832; N. Y. Code, sec. 724; Idaho Rev. Stats., ed. 1887, sec. 4229; Pier *v.* Millerd, 63 Wis. 33; Vt. Stats., ed. 1880, sec. 1422.

[2] Cal. Code Civ. Proc., sec. 473; Ind. Rev. Stats., ed. 1881, sec. 396; N. C. Code Civ. Proc., 274; Nev. Rev. Stats., ed. 1885, sec. 3217; Col. Code Civ. Proc., 75; Dakota Code Civ. Proc., 143.

practiced by the successful party in obtaining the judgment."[1] The statutes of these states further provide that the proceeding shall be by petition and summons, and that the judgment shall not be vacated unless it be first adjudged that there is a valid defense or a valid cause of action. Where the application for relief is sought by motion, and the statute does not otherwise provide, notice of the motion may be served on the attorney of the adverse party, who, notwithstanding a judgment apparently final has been entered, must be regarded as authorized to represent his client in all proceedings begun within the time limited by statute.[2] In Vermont, the county court may set aside a judgment of a justice of the peace, recovered against a party who was prevented from appearing by reason of "fraud, accident, or mistake."[3] In Connecticut, relief may be had on account of mistake, accident, or other reasonable cause.[4] The statutes referred to in this section do not supersede the necessity for moving for a new trial in cases where a trial has been had, at which the parties seeking to have the judgment vacated were properly represented.[5] If they were represented at the trial, they can obtain relief only by an application made in conformity with the rules of procedure provided by law in reference to *new trials*. But if they were not at the trial, or were not represented there, on account of some mistake or excusable neglect, then their remedy is not by application for a new trial, but by an application addressed to the discretion of the court, and made under the statute authorizing relief to be granted from judgments rendered against a party through "his mistake, inadvertence, or excusable neglect."[6] These statutes must be regarded as limiting the cases in which relief can be granted to applications made within the time, and for some of the causes specified in the stat-

[1] Ark. Dig. Stats., ed. 1884, sec. 3909; Ohio Rev. Stats., ed. 1890, sec. 5354; Kan. Comp. Laws, ed. 1885, sec. 4382; McClain's Iowa Stats., ed. 1888, sec. 4383.

[2] Merriam *v.* Gordon, 17 Neb. 325.

[3] Vt. Rev. Stats., ed. 1863, p. 334.

[4] Conn. Gen. Stats., ed. 1888, sec. 1126.

[5] Hobbs *v.* Comm'rs, 122 Ind. 180; McCullock *v.* Doak, 68 N. C. 267.

[6] McKinley *v.* Tuttle, 34 Cal. 239.

ute,[1] provided the relief is sought upon some of the grounds mentioned in such statutes. If, however, the motion is to vacate a judgment because irregularly entered, it may be granted, although not made within the time named in these statutes.[2] Neither do these statutes preclude a party, in a proper case, from obtaining relief in equity, after the time for applying for relief under these statutes "has elapsed, provided proper reasons are shown for not making such application."[3] Nor do these statutes apply to motions made during the term at which the judgment was entered.[4] A judgment will not be vacated on motion of a stranger to the cause, to enable him to be made a party to the action.[5] Error of law is no ground for relief under these statutes.[6] While these statutes designate a time within which application must be made for relief, the proceedings thereunder are equitable in character, and the delay of the moving party after he had notice, actual or implied, of the judgment against him may justify the court in denying relief on the ground of his laches, though his motion was made or his petition filed within the time named in the statute.[7] But in Iowa, the maxim is proclaimed that "laches will not be imputed in the exercise of a legal right within the time prescribed by statute";[8] and hence it was determined that whosoever brings his action or motion within the year cannot be barred of his rights on the ground of laches in not sooner seeking relief.[9] In many instances, where service of process is constructive, and the defendant had no actual notice thereof in time to defend, he may doubtless obtain relief under the statutes already referred to. In several of

[1] Gerrish *v.* Johnson, 5 Minn. 23.

[2] Cowles *v.* Haynes, 69 N. C. 406; Ladd *v.* Stevenson, 112 N. Y. 325.

[3] Coates *v.* Chillicothe Bank, 23 Ohio St. 415; Darst *v.* Phillips, 41 Ohio St. 514; Lumpkin *v.* Snook, 63 Iowa, 515; District Township *v.* White, 42 Iowa, 608; Bond *v.* Epley, 48 Iowa, 600.

[4] McCullock *v.* Doak, 68 N. C. 267.

[5] Smith *v.* Newbern, 73 N. C. 303.

[6] Spafford *v.* Janesville, 15 Wis. 474; Landon *v.* Burke, 33 Wis. 453.

[7] Jouet *v.* Mortimer, 29 La. Ann. 206; Williams *v.* Williams, 70 N. C. 665; Bradford *v.* Coit, 77 N. C. 72; Altman *v.* Gabriel, 28 Minn. 132; Birech *v.* Frantz, 77 Ind. 199.

[8] Independent School District *v.* Schreiner, 46 Iowa, 172.

[9] Independent School District *v.* Schreiner, 46 Iowa, 172.

the states, however, special provision has been made by statute for this class of cases, and where the service was by publication only, the defendant is allowed a specified time, either after the date of the judgment or after notice thereof, within which to appear and make an application to have the judgment opened and to be let in to defend. In some of these statutes the time given is five years, while in others it is a much shorter period. Notice of the defendant's application must be given to the adverse party, and the defendant must show that he had no actual notice of the pendency of the action in time to appear and make his defense. On complying with the conditions of the statute, the moving party secures an absolute right to have the judgment opened, which the court has no discretion to deny;[1] but if he omits to do any act required of him, his motion will be denied.[2] Under some of the statutes, the rights of *bona fide* purchasers cannot be prejudiced by proceedings to open the judgment and to be let in to defend.[3] Under the statute of Iowa declaring that "when a judgment has been rendered against a defendant or defendants served by publication only, and who did not appear, such defendants, or any one or more of them, or any person legally representing him or them, may, at any time within two years after the rendition of the judgment, appear in court and move to have the action retried," it was held that one who claimed to have succeeded to the interest of the defendant during the pendency of the action was not entitled to have the judgment opened.[4] There are also statutes in force in some of the states authorizing the setting aside, on application made within a time designated, of a judgment rendered against a defendant in his absence, upon his complying with the

[1] Savage *v.* Aiken, 14 Neb. 315; Albright *v.* Warkentin, 31 Kan. 442; Ohio Rev. Stats., ed. 1890, sec. 5355; McClain's Iowa Stats., ed. 1888, sec. 4087; Idaho Rev. Stats., ed. 1887, sec. 4229; Frankoviz *v.* Smith, 35 Minn. 278; Kinney *v.* O'Bannon, 6 Bush, 692; McLean *v.* McLean, 84 N. C. 366.

[2] Satterlee *v.* Grubb, 38 Kan. 234.

[3] Ohio Rev. Stats., ed. 1890, sec. 5356.

[4] Parsons *v.* Johnson, 66 Iowa, 455.

conditions in such statutes enumerated.[1] The courts are unable to agree upon what constitutes absence within the meaning of these statutes. On the one side it is insisted that if a defendant is not physically present at the trial, he is necessarily absent and entitled to the benefit of the statute;[2] while on the other side it is held that when a defendant has been personally served with process, or has entered his appearance in the action, he is brought into court, and cannot thereafter be regarded as absent therefrom so as to entitle himself to be relieved from the judgment.[3]

§ 106. **Discretion is Subject to Review.** — Under the uniform construction given to these statutes, the signification of the words "at its discretion" has been materially limited. The "discretion" here referred to is not "the power of acting without other control than one's own judgment." "It is not a mental discretion, to be exercised *ex gratia*, but is a legal discretion, to be exercised in conformity to law.[4] If the power of the court were discretionary in the ordinary sense of that term, the practice would necessarily be as varied as are the different temperaments of judges; and even in proceedings before the same judge, would as probably be shaped by the personal pleasures or annoyances of the several occasions in which he happened to act as by those unvarying rules which, whenever applied to identical circumstances, produce identical results. But the power of the court is nevertheless to be liberally exercised.[5] These statutes are remedial in their character, intended to furnish a simple, speedy, and efficient means of relief in a most worthy class of cases. An order of the court vacating a judgment

[1] Strine *v.* Kignsbaker, 12 Neb. 52; Covart *v.* Haskins, 39 Kan. 571; Riley *v.* Hale, 146 Mass. 465.

[2] Covart *v.* Haskins, 39 Kan. 571.

[3] Riley *v.* Hale, 146 Mass. 465; Strine *v.* Kaufman, 12 Neb. 423; Matthewson *v.* Moulton, 135 Mass. 122; James *v.* Townsend, 104 Mass. 367; Smith *v.* Brown, 136 Mass. 416.

[4] Bailey *v.* Taaffe, 29 Cal. 422; Johnson *v.* Eldred, 13 Wis. 482; Powell *v.* Weith, 68 N. C. 342.

[5] Roland *v.* Kreyenhagen, 18 Cal. 455; Mason *v.* McNamara, 57 Ill. 274.

entered by default will not be disturbed by the appellate court, except in case "of gross abuse of the discretion of the court."[1] Both orders granting and orders denying applications under these statutes are subject to review upon appeal;[2] but only in extreme cases is the action of a trial court likely to be reversed. If the moving party makes a clear and unquestionable showing that he has a good defense or cause of action on the merits, of the benefit of which he has been deprived without fault on his part, the court has no discretion to deny him relief, and should it do so, its action will be set aside, and proper relief ordered by the appellate court.[3] On the other hand, if the facts are disputed, the finding of the lower court will be treated as conclusive on appeal;[4] and even when the facts are not questioned, its action will not be reversed, except it clearly appears that its discretion has been abused,[5] or arbitrarily exercised.[6] If it appears proper to the trial court to grant relief, it may also exercise a sound discretion as to terms and conditions upon which it will be granted. It may omit all conditions,[7] or may impose any condition whatever not savoring of a capricious or arbitrary use of its powers. Thus in a proper case, the defendant, as a condition of having judgment against him opened or set aside, may be required to confine his evidence to a particular ground of defense,[8] or to consent to the appointment of a receiver,[9] or to stipulate not to bring an action against parties who have acted under the judgment,[10] or to pay all costs accrued up to the date of its vacation,[11] or to deposit money in court

[1] Howe *v.* Independence Co., 29 Cal. 72; Merritt *v.* Putnam, 7 Minn. 493.

[2] Haight *v.* Green, 19 Cal. 113; Mulholland *v.* Heyneman, 19 Cal. 605; 29 Cal. 422; Hill *v.* Crump, 24 Ind. 291.

[3] Craig *v.* Smith, 65 Mo. 536; Cleveland *v.* Hopkins, 55 Wis. 387; Cleveland *v.* Burnham, 55 Wis. 598; Haggerty *v.* Walker, 21 Neb. 596.

[4] Weil *v.* Woodward, 104 N. C. 94; Wernet's Appeal, 91 Pa. St. 319.

[5] Smith *v.* Black, 51 Md. 247; Kerchner *v.* Baker, 82 N. C. 169; Hiatt *v.* Waggoner, 82 N. C. 173; Parsons Bank *v.* Wentworth, 28 Kan. 183; Brophy *v.* J. M. Brunswick and Balke Co., 2 Wyo. 86.

[6] Pry *v.* Hannibal & St. J. R. R. Co., 73 Mo. 123.

[7] Ryan *v.* Mooney, 49 Cal. 33.

[8] Houston Township and Fire Ins. Co. *v.* Beale, 110 Pa. St. 321.

[9] Exley *v.* Berryhill, 36 Minn. 117.

[10] Young *v.* Bircher, 31 Mo. 136; 77 Am. Dec. 638.

[11] Howe *v.* Coldren, 4 Nev. 171.

to pay so much of the claims sued upon as he admits to be due.[1] The imposition of this last condition seems to us to be, in ordinary circumstances, an abuse of discretion, because it may require the defendant, in order to escape from an unjust demand, to pay another but just demand which he is without pecuniary liability to discharge. In two instances, the imposing of a condition that defendant should give a bond with sureties for the payment of such judgment as might ultimately be recovered against him was decided to be an abuse of discretion.[2]

§ 107. **Party Recovering may Move to Vacate.** — The literal meaning of the words employed in these statutes has been further modified by judicial construction. The statute says the court may relieve a party from a judgment "taken against him." But a party in whose favor a judgment has been rendered has been decided to be within the meaning, but not within the words, of the statute, on the ground that the law, being of a remedial character, must be liberally construed.[3] Such a party, however, though nominally prevailing, may lose part of his demand. To that extent he would be entitled to an appeal; and it is no far-fetched construction to say that he is, therefore, within the words as well as within the meaning of the statute.

§ 108. **Affidavit of Merits.** — These statutes are to be employed only in furtherance of justice, and never for the purpose of enabling a party to raise some technical objection. Even where the statute does not so expressly direct, no judgment will be opened unless it is shown to be unjust. "Every consideration of expediency and justice is opposed to the opening up cases in which judgment by default has been entered, unless it be made to appear *prima facie* that the judgment as it stands is unjust."[4] In

[1] Magoon *v.* Callahan, 39 Wis. 141.
[2] Brown *v.* Brown, 37 Minn. 128; Union Bank *v.* Benjamin, 61 Wis. 512.
[3] Montgomery *v.* Ellis, 6 How. Pr. 326.
[4] Parrott *v.* Den, 34 Cal. 79; Thatcher *v.* Haun, 12 Iowa, 303; Wooster Coal

all cases an affidavit of merits must be made and filed, except where it appears that the court had never acquired jurisdiction over the moving party, and that its judgment against him is void;[1] but in this class of cases he is entitled to relief independently of these statutes.[2] Where the affidavit to open a default stated that, after a careful examination, the attorneys are of the opinion that they have a good *legal* defense to the complaint, the judgment was not set aside, because the matter shown appeared to be of a technical character;[3] and for aught that appeared to the contrary, the judgment might be perfectly consistent with fair dealing. A verified answer has been held not to obviate the necessity for an affidavit of merits. The reasoning upon which this view is based is, that while an answer might be true, and the matters set forth in it might, upon their face, seem to form a sufficient defense to the complaint, yet they might be affected by other matters in avoidance, well known to the defendant, but which he was under no obligation to state in his answer; that in order to authorize the interposition of the court, something more ought to be required than an exhibition of facts which, if neither explained nor avoided, would present an obstacle to plaintiff's recovery; that to bring a case completely within the statute, it must appear *prima facie* that the defendant, in addition to having an answer to the complaint, has a defense which is sufficient and meritorious when viewed in all the light which can be thrown upon it by all the facts involved in the action.[4] We see, however, no sufficient reason for denying to a verified answer the effect of an affidavit of merits, provided its contents are such as must be regarded as sufficient when found in an affidavit of merits.[5] In some of the

Co. *v.* Nelson, 4 U. C. P. 343; Mulhollan *v.* Scoggin, 8 Neb. 202; Anderson *v.* Beebe, 22 Kan. 768; Niagara Ins. Co. *v.* Rodecker, 47 Iowa, 162; Bank of Statesville *v.* Foot, 77 N. C. 131; Mauney *v.* Gedney, 88 N. C. 200; Draper *v.* Bishop, 4 R. I. 489.

[1] Dobbins *v.* McNamara, 113 Ind. 54.

[2] *Ante*, sec. 98.

[3] People *v.* Rains, 23 Cal. 127.

[4] Jones *v.* Russell, 3 How. Pr. 324; Mowry *v.* Hill, 11 Wis. 146. But the rule has, in Wisconsin, been changed by statute: See Town of Omro *v.* Ward, 19 Wis. 232.

[5] Huebner *v.* Farmers' Ins. Co., 71 Iowa, 30.

states a motion to set aside a judgment and to be let in to defend must be accompanied by a verified answer.[1] As to the contents of the affidavit of merits, the practice differs essentially in different states. The more reasonable, in our judgment, is the one which requires the moving party to disclose his cause of action or ground of defense with such particularity as enables the court to determine whether or not it is good and sufficient on the merits.[2] The other and less defensible practice substitutes the moving party and his counsel for the court and accepts their judgment as conclusive,[3] and requires his affidavit to show that he "has fully and fairly stated the case to his counsel," and that after such statement he is advised by his counsel and believes that "he has a good, full, and perfect defense to the action upon the merits." An affidavit showing that defendant had stated "his defense" is insufficient, because it does not show that he has disclosed all the material facts affecting the action, nor what matters in avoidance of his defense exist. It should show that he had stated "the case."[4] An affidavit that defendant had fully stated the facts of the case to his counsel has been held insufficient; it should declare that he has fully and fairly stated such facts.[5] It is not indispensable that the affidavit of merits be made by the defendant personally. His attorney may make it.[6] Where the affidavit is made by some person other than the defendant, it should appear that such person is acquainted with the facts he attempts to make known to the court.[7] An affi-

[1] Spencer *v.* Thistle, 13 Neb. 227; Cleveland *v.* Burnham, 55 Wis. 598.

[2] Lamb *v.* Nelson, 34 Mo. 501; Foster *v.* Martin, 20 Tex. 118; Roberts *v.* Corby, 86 Ill. 182; Castlio *v.* Bishop, 51 Mo. 162; Railway Co. *v.* Gates, 23 Ind. 238; Goldsberry *v.* Carter, 28 Ind. 59; Frost *v.* Dodge, 15 Ind. 139; Slagle *v.* Bodner, 75 Ind. 330; Contreras *v.* Haynes, 61 Tex. 103; Crossman *v.* Wohlleben, 90 Ill. 537; Williams *v.* Kessler, 82 Ind. 183; Jaeger *v.* Evans, 46 Iowa, 188; Palmer *v.* Rodgers, 70 Iowa, 381.

[3] Woodward *v.* Backus, 20 Cal. 137; Burnham *v.* Smith, 11 Wis. 258; Bernstein *v.* Brown, 23 Neb. 64.

[4] Burnham *v.* Smith, 11 Wis. 258; Nickerson *v.* California R. R. Co., 61 Cal. 268.

[5] Morgan *v.* McDonald, 70 Cal. 32.

[6] Francoviz *v.* Smith, 35 Minn. 278; Jean *v.* Hennessy, 74 Iowa, 348.

[7] Hitchcock *v.* Herzer, 90 Ill. 543; Baker *v.* Knickerbocker, 25 Kan. 288; Woodworth *v.* Coleman, 57 Vt. 368.

davit by the attorney that from an examination of the defendant's case, so far as he has been able to examine it, he verily believes it is better than plaintiff's, is therefore insufficient. It does not show that the attorney knows what the defense is; nor whether the examination was meager or thorough. Neither does he state that the defendant had fully and fairly stated the case, and "what, in view of such statement, is his professional opinion touching the defense." But this omission in an affidavit made by an attorney is immaterial; for the statements of the defendant, incorporated into an affidavit made by another person is nothing "but hearsay, and therefore entitled to no weight."[1] Under these statutes, the courts discriminate against defenses of a technical character, regarding them as not "on the merits." There is no very safe and unquestionable test by which defenses good and sufficient under the laws of the state may be recognized as meritorious or non-meritorious; and perhaps the courts would do best to treat with equal forbearance all defenses which are sufficient in law, unless they are assailed upon some clear ground of equitable jurisdiction. Therefore the defense of the statute of limitations has been treated as "on the merits," so as to entitle a judgment to be opened to permit it to be interposed;[2] while on the other hand the defense of usury[3] and of the statute of limitations[4] have been held to be defenses which the court might, in the exercise of its discretion, refuse to open a judgment to entertain.

§ 109. **May Contradict the Record, but not the Affidavit of Merits.** — In applications under these statutes the parties are at liberty to contradict the record, and to establish, by any competent evidence, the truth of the facts upon which their claim to relief is based.[5] But the hear-

[1] Bailey *v.* Taaffe, 29 Cal. 422.
[2] Ellinger's Appeal, 114 Pa. St. 505; Mitchell *v.* Campbell, 14 Or. 454.
[3] Hazelrigg *v.* Wainright, 17 Ind. 215.
[4] Sheets *v.* Baldwin, 12 Ohio, 120; Newsom's Adm'r *v.* Ran, 18 Ohio, 240.
[5] McKinley *v.* Tuttle, 34 Cal. 235; Mosseaux *v.* Brigham, 19 Vt. 457; Gay *v.* Grant, 101 N. C. 206.

ing of evidence is confined to the question, whether the judgment has been taken through the inadvertence, mistake, surprise, or excusable neglect of the defendant. The applicant is not required to make more than such a *prima facie* showing of merits as arises from his own affidavits. The code did not intend that there should be two trials of the merits. Therefore the defendant is not required to prove his defense, as he would at the trial, nor can his affidavits of merits be controverted.[1]

§ 110. **New Motion Treated as Amendment of an Old One.** — In Wisconsin, an application granted in the lower court was dismissed in the supreme court for want of an affidavit of merits, without prejudice to a new motion. But during the time involved in determining the first motion, the period in which the statute authorized an application for relief expired. A new motion was, however, at once made, and was opposed on the ground that it came too late. Whereupon it was adjudged to be substantially a continuation of the old motion, in the nature of an amendment of the papers on which that motion was founded; and being otherwise meritorious and in conformity to the practice, it was granted.[2]

§ 111. **Lenience of New York Courts.** — These statutes surely were not designed to confer upon the same court both an original and an appellate jurisdiction over the same cause;[3] nor yet to allow a party, once having an ample opportunity to present his defense or cause of action, to re-present it at some future time, with such other features as a more mature reflection happened to suggest. Yet there are cases scarcely reconcilable with any other theory. They have chiefly, if not exclusively, been deter-

[1] Pratt *v.* Keils, 28 Ala. 390; Francis *v.* Cox, 33 Cal. 323; Hill *v.* Crump, 24 Ind. 271; Gracier *v.* Weir, 45 Cal. 53; Bank *v.* Harrison, 4 U. C. P. 331; Wooster Coal Co. *v.* Nelson, 4 U. C. P. 343; Buck *v.* Havens, 40 Ind. 221; Beatty *v.* O'Connor, 106 Ind. 81; Brestor *v.* Galvin, 62 Ind. 352; Joerns *v.* Le Nicca, 75 Iowa, 705.

[2] Butler *v.* Mitchell, 17 Wis. 52. See also Howell *v.* Harrell, 71 N. C. 161.

[3] Greer *v.* Mayor of New York, 4 Rob. (N. Y.) 675.

mined in a state where judgments seem to be regarded, not as inviolate and enduring testimonials, but as temporary structures, to be torn down, remodeled, or rebuilt whenever the builders feel competent to improve the original workmanship or design. Thus in one case, a judgment in all respects regular, and resulting from a trial in which there was no pretense of any want of opportunity to defend, and at which both parties were represented by counsel, was set aside because of an error of the court in estimating the value of a life estate. The defendant was a municipal corporation, whose counsel was an elective officer not under its control. This counsel was obliged to attend to a vast amount of business, and could not, therefore, devote much attention to any particular case. These were the reasons upon which the court justified its interposition. In another case, the action was for an amount due under a contract for work upon the streets. Judgment was obtained, the defendant being properly in court, and contesting plaintiff's right to recover part of his demand. The defendant was afterward relieved from a portion of the judgment, on the ground that a misapprehension existed between plaintiff and defendant, in making the original contract, by reason of which neither had assented to the contract as understood by the other.[1] The mistake of counsel in conducting the case, arising out of his ignorance of the law, was the only ground upon which relief from another judgment was granted. The principles which, in the opinion of the court, should be applied to the case were indistinctly defined as follows: "There may be a case so novel and peculiar in its nature, in which it is so palpable that actual injustice may and probably has been done, and where there are no other means of relief, that the court will feel bound to relieve the party from the consequence of the inadvertence and mistake of his counsel, although it arose from a misapprehension of the law or rules of practice, if that can be

[1] Pettigrew *v.* Mayor of New York, 17 How. Pr. 492.

done without prejudice to the rights of the parties; by which is meant, without any loss to them, other than such as may necessarily result from establishing what may be shown to be the rights of the party applying."[1]

§ 111 a. **Fraud Practiced in Obtaining a Judgment** is sometimes specified in the statutes as one of the grounds which entitle an innocent and injured litigant to have it vacated.[2] Even if this ground were not specifically enumerated in the statute, it would generally be available to the injured party on the ground that it had occasioned the rendition of a judgment against him by surprise, or mistake, or under circumstances which, as to him, might well be deemed excusable neglect. A very serious question arises, whether the fraud for which a judgment may be vacated under these statutes includes, in any case, the willful perjury of the successful litigant at the trial. In a comparatively recent case which was heard in the supreme court of Kansas on two or three separate appeals, that tribunal concluded that a judgment wholly unjust, and procured by the willful perjury of the plaintiff, ought to be vacated, although the defendants did not show "unavoidable casualty or misfortune, preventing them from defending the original action."[3] "A party," said the court, "is never required to exercise more than reasonable and ordinary diligence in preventing a fraud from being perpetrated upon him, and fraud vitiates everything it touches. Of course, a defendant failing to defend cannot have the judgment vacated on account of any innocent mistake or want of recollection on the part of the plaintiff or other witness, nor even on account of the perjury of the other witnesses, provided the plaintiff himself is wholly guiltless. Nor can he have the judgment vacated on account of any mistake or error on the

[1] Levy *v.* Joyce, 1 Bosw. 622.

[2] Independent School District *v.* Schreiner, 46 Iowa, 172.

[3] Laithe *v.* McDonald, 12 Kan. 340; 7 Kan. 254; Baldwin *v.* Sheets, 39 Ohio St. 624. See Heathcoote *v.* Haskins, 74 Iowa, 566, 570.

part of the court or jury, unless the record affirmatively shows such mistake or error. All such mistakes or errors each party is bound to anticipate, and to prepare for by extraordinary diligence. But no party is bound to anticipate or to suppose that the other party will commit willful and corrupt perjury; and no party is bound to exercise extraordinary diligence in preparing to meet such perjury. In this case we think the defendants exercised reasonable diligence." The diligence which was in this case adjudged to be reasonable and sufficient consisted of filing an answer so that judgment could not be obtained by default, nor otherwise than through false testimony; of taking ineffectual steps to procure witnesses in time for the trial; and on ascertaining that the witnesses could not be obtained in time, of writing a letter to counsel to obtain a continuance, the letter being written in time, but not reaching its destination, owing to delay in the United States mails. We are not sure that these decisions are not sustainable under the peculiar facts of the case; but, manifestly, great caution must always be exercised before vacating or granting relief from a judgment when the parties are regularly in court, the cause regularly brought on for trial, and the alleged grounds for relief involve a re-examination of the issues already tried.[1]

§ 112. **Neglect of Attorney.** — The neglect of an attorney or agent is uniformly treated as the neglect of the client or principal,[2] except in New York and North Carolina.[3] A default will not be opened because the attorney had prepared a demurrer, but had failed to file it by

[1] Flower *v.* Lloyd, 8 Cent. L. J. 415; 6 L. R. Ch. Div. 297; 37 L. T., N. S., 419; *post*, secs. 289, 435, 503.

[2] Austin *v.* Nelson, 11 Mo. 192; Kerby *v.* Chadwell, 10 Mo. 392; Merritt *v.* Putnam, 7 Minn. 493; Jones *v.* Leech, 46 Iowa, 186; Gherke *v.* Jod, 59 Mo. 522; Matthis *v.* Town of Cameron, 62 Mo. 504; Niagara Ins. Co. *v.* Rodecker, 47 Iowa, 162. In North Carolina, the failure of an attorney to enter a plea, when employed to do so, was held to entitle his client to relief on the ground of surprise: Griel *v.* Vernon, 65 N. C. 76; but when the only showing was that the defendant had written to an attorney to appear for him, who did not do so, relief was denied: Burke *v.* Stokely, 65 N. C. 569.

[3] Gwathney *v.* Savage, 101 N. C. 103.

reason of his miscalculating the time when it was due;[1] neither will relief be granted because the attorney forgot the day fixed for the trial.[2] And, in general, no mistake, inadvertence, or neglect attributable to the attorney can be successfully used as a ground for relief, unless it would have been excusable if attributable to the client.[3] The neglect of a person who undertook to act for the attorney is treated in the same manner as if committed by the attorney. Thus where the petitioner's attorney, being suddenly called away, requested another person to attend the suit, and to get an attorney to appear, and the party agreed to comply with the request, but forgot the matter entirely, it was held that the neglect of this party could only be regarded as the neglect of the attorney, and that, considered in that light, it was not excusable.[4] In New York, a default and judgment thereon were set aside on showing that proceedings were utterly neglected by the attorney, who was rendered incompetent by his habits, because an attorney ought not to be permitted to inflict unbounded damage on his client, there being no redress except the doubtful one of an action for negligence.[5]

§ 113. **Mistake.**—A mutual and honest mistake between the defendant and an attorney, in relation to the retainer of the latter, by reason of which the defendant was not represented at the trial, authorizes the granting of relief from the judgment.[6] Where the defendants attended court until the judge announced that the cause would not be tried at that term, when they left, and the cause was afterward called and judgment entered, it was

[1] People *v.* Rains, 23 Cal. 127.

[2] Babcock *v.* Brown, 25 Vt. 550; 60 Am. Dec. 290.

[3] Spaulding *v.* Thompson, 12 Ind. 477; 74 Am. Dec. 221; Smith *v.* Tunstead, 56 Cal. 175; Harper *v.* Mallory, 4 Nev. 447; Brumbaugh *v.* Stockman, 83 Ind. 583; Welch *v.* Challen, 31 Kan. 696; Sharp *v.* Moffitt, 94 Ind. 240; Kreite *v.* Kreite, 93 Ind. 583; Tarrant Co. *v.* Lively, 25 Tex. Sup. 399; Clark *v.* Ewing, 93 Ill. 572; McFarland *v.* White, 13 La. Ann. 394.

[4] Webster *v.* McMahan, 13 Mo. 582; Davison *v.* Heffron, 31 Vt. 687.

[5] Elston *v.* Schilling, 7 Rob. (N. Y.) 74; Meacham *v.* Dudley, 6 Wend. 514.

[6] McKinley *v.* Tuttle, 34 Cal. 235; Pancsi *v.* Boswell, 12 Heisk. 323. For *contra* opinion, see Kite *v.* Lumpkin, 40 Ga. 506.

opened upon application, accompanied by an affidavit of merits.[1] The mistake of defendants in concluding that the judgment would not be entered against them personally, but only against them as trustees, that being the only capacity in which they were liable, justifies the court in vacating a judgment taken against them individually.[2] Judgment should not be set aside on the ground that the defendant mistook the court in which the action was pending,[3] nor because he did not appear on account of his having no recollection of the service of summons.[4] A German was prosecuted in a criminal and in a civil action at the same time, for obstructing a highway. He understood the English language very imperfectly, and seemed to confound the two actions. He attended to the criminal action diligently, but was defaulted in the civil. He applied on the next day after the entry of the default, to have the judgment set aside, and the application was granted on payment of the attorney's fees.[5] So where a very illiterate man applied to an attorney, and stated that his goods had been attached, that he did not owe the debt, and that he wished to have the goods released, and the attorney took proceedings to have the goods released, but did not make any defense to the action, because he did not know that any summons had been served, the judgment was set aside, because the defendant, being an illiterate man, did not know that he need give his attorney any other information than that his property was attached, and the attorney, by not having further information, was misled as to the immediate necessity of making a defense.[6] The grounds of mistake most frequently relied upon for relief are in the fact of the service of process, or in the date at which the party served must appear, or at which the action is set for trial. Because the lower courts exercise a discretion with which the appellate courts are loath to

[1] Ratliff *v.* Baldwin, 29 Ind. 16; 92 Am. Dec. 330.
[2] Butler *v.* Mitchell, 17 Wis. 52.
[3] Robertson *v.* Bergen, 10 Ind. 402.
[4] Langdon *v.* Bullock, 8 Ind. 341.
[5] Bertline *v.* Bauer, 25 Wis. 486.
[6] Nash *v.* Cars, 92 Ind. 216; Sweet *v.* McGlynn, 5 Pac. L. Rep. 155.

interfere, as well as from other causes, there is not an entire harmony of decision upon these subjects, but we think it a fair inference from the reported cases that if the court is convinced that the alleged mistake was an honest one and was the sole cause of the moving party's not being represented at the trial or not appearing in the action in due time, relief will be granted. A court is justified in vacating a judgment obtained in the absence of the defendant when he had been led to believe that the cause would not be tried, or had been otherwise misinformed as to the time of trial, and there is no doubt of his acting in good faith,[1] or where the attorney overlooked the case on the trial calendar by reason of its being placed there under a title calculated to mislead, though he might have ascertained that the cause had been set for trial by inquiring at the clerk's office,[2] though probably, in such cases, if the trial court had denied to open the judgment its action could not have been reversed as an abuse of its discretion.[3] So a failure to appear or to answer may be excused, and a judgment resulting therefrom may be vacated, if the moving party or his attorney mistook the term day,[4] or supposed that a rule was in force giving a particular time in which to answer,[5] or made a mistake as to the day when summons was served,[6] or was acting under the belief that the summons served was a subpœna to attend court as a witness, and this belief was caused by the officer who served the process,[7] or the process was served on an agent of a corporation, who by mistake sent it to the wrong officer of the defendant.[8] If, however, the judgment was due to a mistake of the defendant regarding his legal rights, resulting in the belief that it would be fruitless to answer, relief will not be granted,[9] nor will

[1] Cruse *v.* Cunningham, 79 Ind. 402; Sanders *v.* Hall, 37 Kan. 271; Jean *v.* Hennessy, 74 Iowa, 348; Buena Vista County *v.* Iowa Falls etc. R. R. Co., 49 Iowa, 657; Branch *v.* Walker, 92 N. C. 87.

[2] Allen *v.* Hoffman, 12 Ill. App. 573.

[3] O'Connor *v.* Ellmaker, 83 Cal. 452.

[4] Farmers' Mut. Fire Ins. Co. *v.* Reynolds, 52 Vt. 405.

[5] English *v.* English, 87 N. C. 497.

[6] Reidy *v.* Scott, 53 Cal. 69.

[7] Hite *v.* Fisher, 76 Ind. 231.

[8] Houston etc. R. R. Co. *v.* Burke, 55 Tex. 323.

[9] Thacher *v.* Thacher, 125 Ind. 489.

it be granted because defendant supposed the process had not been served on him in the mode required by law, and thought that a copy of the complaint must be given to him, as well as a copy of the summons.[1]

§ 114. **Excusable Neglect.** — Where the statute enumerates excusable neglect as one of the grounds for vacating a judgment, it seems superfluous to name any other; for such other grounds as have been named, to wit, mistake, surprise, inadvertence, unavoidable casualty, or misfortune, if they or any of them exist under circumstances such as entitle the moving party to relief, constitute a case of excusable neglect. The circumstances under which a party may be entitled to relief because of his excusable neglect are of infinite variety. The most familiar instances are: Illness of the party, or of a member of his family,[2] or of his counsel or of his family,[3] whereby the losing party was prevented either from appearing in the action within the time required by law or from attending at the trial; or the death of counsel,[4] or by his being called away on important business and unavoidably detained so that he could not reach the court-room until after the cause was called for trial;[5] or because of a misunderstanding between parties and counsel;[6] or because counsel was unavoidably detained in the trial of another cause in another court;[7] or was otherwise unavoidably absent;[8] or because an attorney entered the appearance of a defendant unintentionally and without authority;[9] or the moving party was absent in compulsory attendance on a court,[10] or in the military service;[11] or, being a married woman, her

[1] Churchill *v.* Brooklyn Life Ins. Co., 88 N. C. 205.

[2] Flanagan *v.* Patterson, 78 Ind. 514; Benedict *v.* Spendiff, 9 Mont. 85; Goodhue *v.* Meyers, 58 Tex. 405; Slagle *v.* Bodner, 75 Ind. 330.

[3] Tidwell *v.* Witherspoon, 18 Fla. 282; Nye *v.* Swan, 42 Minn. 243.

[4] Kivett *v.* Wynne, 89 N. C. 39.

[5] Ellis *v.* Butler, 78 Iowa, 633.

[6] Beatty *v.* O'Connor, 106 Ind. 81; Howell *v.* Glover, 65 Ga. 466; Kupferle *v.* Merchants' Bank, 32 Ark. 717; Heaps *v.* Hoopes, 68 Md. 383.

[7] Ellis *v.* Butler, 78 Iowa, 632; McArthur *v.* Slawson, 60 Wis. 293.

[8] McArthur *v.* Slawson, 60 Wis. 293; Beall *v.* Marietta, 45 Ga. 28. *Contra*, Claussen *v.* Johnson, 32 S. C. 86.

[9] Stocking *v.* Hoopes, 35 Minn. 207; Heaps *v.* Hoopes, 68 Md. 383.

[10] Tullis *v.* Scott, 38 Tex. 537.

[11] Piper *v.* Aldrich, 41 Mo. 421.

husband, without her authority, caused her attorney to withdraw her appearance;[1] or because defendant or his attorney was prevented from attending the trial by an unavoidable accident;[2] or because the return day was incorrectly stated in the writ;[3] or because of the excusable neglect[4] or inadvertence[5] of the defendant's attorney; or because the cause was taken up in the absence of defendant's counsel, contrary to agreement;[6] or because of the forgetfulness of the person to whom the defense was committed, arising from his financial troubles;[7] or because defendant acted on the assurance of counsel of plaintiff and also of an officer of the court that the matter would be arranged.[8]

The defendant, as soon as served with summons, set about making such inquiries as were necessary to his defense. He was soon compelled to go beyond the state on important business, and to remain away several weeks. On returning home, he was obliged, by important business, to go into another state, and to remain there several weeks. He constantly intended to prepare his answer, but owing to his absence from home and the pressure of his other engagements, he *mistook* the time when his default was due. The action of the lower court in refusing to grant relief upon a showing of these facts was reversed because "the mistake arising from the urgency and multitude of defendant's business was such a mistake as any prudent and vigilant man might, under like circumstances, fall into."[9] An affidavit showing that defendant had employed counsel and had caused a subpœna to issue for his witness, but had been prevented from attending court by the dangerous illness of his wife; that his counsel

[1] Crescent B. Co. *v.* Cullins, 125 Ind. 110.

[2] Fulweiler *v.* Hog's Back C. M. Co., 83 Cal. 126; McGaughney *v.* Woods, 92 Ind. 296; Yetser *v.* Martin, 58 Iowa, 612.

[3] Kimball *v.* Kelton, 54 Vt. 177.

[4] Dougherty *v.* Nevada Bank, 68 Cal. 275.

[5] Wadsworth *v.* Wadsworth, 81 Cal. 182; Norwood *v.* King, 86 N. C. 80.

[6] McGaughney *v.* Woods, 92 Ind. 296.

[7] Heardt *v.* McAllister, 9 Mont. 405.

[8] Weil *v.* Woodward, 104 N. C. 94.

[9] Johnson *v.* Eldred, 13 Wis. 482.

was provost-marshal, and on account of being engaged in enforcing the draft had been unable to attend the trial, — discloses such a state of facts that it would be an abuse of the discretion of the court to refuse to vacate the judgment.[1] A defendant who was constructively served, and was absent from the state, suffering from such a bodily disability as prevented his return, is entitled to have his default set aside.[2] That defendant was attacked by a severe illness, during which his life was despaired of and his mind so impaired that he was incapable of making his defense, is a good ground for vacating a judgment.[3] Failure of counsel to attend the trial, owing to his illness,[4] is a sufficient ground for relief, particularly if the illness was of such a character that his "forgetfulness" is excusable neglect.[5] Although a stipulation is not binding on the parties to it unless made in writing, yet the neglect of a party, occasioned by a verbal agreement between himself and his adversary, is "excusable."[6] And where the plaintiff promised to call at the defendant's office "and fix the matter up," and the defendant, relying upon the promise, neglected the suit, the judgment was opened by the court. An appeal being taken, the appellate court thought that there was negligence on the part of the defendant, but that it was of the excusable nature which the statute was provided to relieve; that while it was imprudent to rely on the promise, yet it was in ill grace for the plaintiff to urge that the negligence occasioned by himself was inexcusable.[7]

That the moving party was mentally incompetent to make his defense, as where he was, at the time of the service of process upon him, and of the trial, insane, is sufficient to require that relief be granted, although his property has in the mean time been sold to an innocent

[1] Hill *v.* Crump, 24 Ind. 291.
[2] Sage *v.* Matheny, 14 Ind. 369.
[3] Luscomb *v.* Maloy, 26 Iowa, 444.
[4] Bristor *v.* Galvin, 62 Ind. 352.
[5] Montgomery Co. *v.* American E. Co., 47 Iowa, 91.
[6] Montgomery *v.* Ellis, 6 How. Pr. 326; Chicago & N. W. R. R. Co. *v.* Gillett, 38 Iowa, 434.
[7] Stafford *v.* McMillan, 25 Wis. 566.

purchaser under process issued upon the judgment;[1] and there are many instances in which, though the party is not insane nor so mentally incompetent to attend to business as to require the appointment of a guardian, yet he is either so ignorant of the language of the country or its mode of business, or is so simple-minded and credulous as to be with the spirit if not within the language of the statute. In such cases relief will generally be granted, as where the applicant was an elderly woman unable to read or write and did not understand the nature of the proceedings against her;[2] or a Mission Indian, ignorant and helpless, who for many years had occupied lands for the recovery of which judgment in ejectment was entered;[3] or a married woman, physically and mentally helpless, whose husband had forged her name to the mortgage which the mortgagor is foreclosing against her.[4]

No matter what is the alleged cause upon which the moving party seeks to have a judgment against him vacated, the court will not relieve him, unless convinced that he has acted in good faith and that the accident mistake, or other cause by which he seeks to excuse himself was the real cause of his suffering default or not attending the trial, and that, notwithstanding its existence, he could not have protected himself by the exercise of reasonable diligence. Thus it is not sufficient that he or his counsel was ill, if that illness was not the cause of the judgment;[5] nor that there was some misunderstanding, through which counsel failed to enter proper pleas, if the client was guilty of laches in not giving any attention to his case himself, and in failing to make any inquiry concerning it for a long period of time;[6] or in failing to employ other counsel, when he heard his own counsel would not be able to defend him.[7] If the defendant could

[1] Dickerson *v.* Davis, 111 Ind. 433.
[2] Adams *v.* Citizens' State Bank, 70 Ind. 89.
[3] Byrne *v.* Alas, 68 Cal. 479.
[4] Clandy *v.* Caldwell, 106 Ind. 256.
[5] Shaffer *v.* Sutton, 49 Ill. 506; Gardenhire *v.* Vinson, 39 Ark. 270; Cannon *v.* Harrold, 61 Ga. 158; Johnson *v.* Lindstrom, 114 Ind. 152; Edwards *v.* McKay, 73 Ill. 570.
[6] Youngman *v.* Tonner, 82 Cal. 611; Schroer *v.* Wessell, 89 Ill. 113; McLean *v.* McLean, 84 N. C. 366.
[7] Clark *v.* Ewing, 93 Ill. 572.

not attend the trial because of illness of himself or of some member of his family, but was represented by counsel, who, notwithstanding, announced himself as ready, and proceeded to trial, the judgment subsequently recovered will not be vacated because of the absence of defendant when his case was tried.[1]

§ 115. **Inexcusable Neglect.** — Every suitor should personally attend to his case, or be represented by an attorney in fact. Therefore an affidavit showing that the defendant expected the witnesses, whom he had subpœnaed, to appear at the trial, and on that account, and because his counsel knew of the defense, did not attend personally, and the witnesses did not attend, and judgment was obtained on account of their absence, there being no one present to make an affidavit for a continuance, does not show an excusable neglect. The duty of the counsel did not extend to procuring witnesses, nor to making affidavits for continuances. The defendant, neither being present to perform that duty, nor having any one to represent him for that purpose, was culpably negligent.[2] A judgment by default should not be vacated on the ground of excusable neglect because the answer required more than ordinary time for its preparation, and the attorney was, during a part of the time, out of town.[3] Any difficulty arising from this source could, undoubtedly, be obviated by an application to the court or the plaintiff's counsel for an extension of time. An affidavit showing that defendant, when he retained counsel in the case, was under the impression that the time to answer had not expired; that he did not recollect the precise day when the summons was served; that he was quite ill at the time, and did not as carefully note the time as he would otherwise have done, — is entirely insufficient. It does not appear that the illness of defendant extended beyond

[1] Skinner *v.* Bryce, 75 N. C. 287.
[2] Waddell *v.* Wood, 64 N. C. 624.
[3] Bailey *v.* Taaffe, 29 Cal. 422.

one day; nor that, during that day, it rendered him unfit for ordinary business.[1] The fact that the defendant did not appear and answer because he supposed the summons served on him to be a subpœna,[2] or some paper in another case,[3] does not entitle him to relief. His failure to examine the paper is inexcusable.

§ 115 a. **Surprise and Unavoidable Casualty and Misfortune.** — The instances in which judgments have been vacated for surprise are infrequent; relief, when given at all, generally being placed upon some other ground. In North Carolina, if an attorney employed to appear and answer fails to do so, the client may be relieved from the judgment on the ground of surprise, provided he has not been guilty of laches himself.[4] So where there was a petition, a demurrer thereto, and also an answer, all on file, and the demurrer to the petition was argued and submitted, and when it was decided the court not only overruled the demurrer but also gave judgment for the petitioner on the ground that the answer was defective, it was held that this ruling upon the sufficiency of the answer, there being no motion for judgment on the pleadings, operated as a surprise to the defendant, and entitled him to relief.[5] Where a judge was disqualified to try a cause, and a special judge was chosen in the absence of the defendant, and without his knowledge and that of his counsel, and the cause tried in his and their absence, this was held to be a surprise justifying the granting of relief from the judgment.[6] In most of the states surprise is a ground for a new trial, and we apprehend that such surprise as may be relieved from by motion for a new trial is

[1] Elliott *v.* Shaw, 16 Cal. 377.

[2] State *v.* O'Neil, 4 Mo. App. 221.

[3] White *v.* Snow, 71 N. C. 232. For other instances of neglect deemed inexcusable, see Governor *v.* Lassiter, 83 N. C. 38; Lowell *v.* Ames, 6 Mont. 369; Bash *v.* Van Osdal, 75 Ind. 186; Birch *v.* Frantz, 77 Ind. 199; Smythe *v.* Kastler, 16 Neb. 264; Brown *v.* Hale, 93 N. C. 188; Metzger *v.* Waddell, 1 N. Mex. 400; Bowen *v.* Braguiner, 88 Ind. 558.

[4] Griel *v.* Vernon, 65 N. C. 76; McLean *v.* McLean, 84 N. C. 366; Whitson *v.* Western N. C. R. R. Co., 95 N. C. 385.

[5] Heilbron *v.* Campbell, 23 Pac. Rep. 1032.

[6] Bennett *v.* Jackson, W. Va., June, 1890.

not available on motion to vacate the judgment; in other words, that if the parties are represented at the trial, and are surprised by the rulings of the court, or by anything else which takes place at that time, they must move for a new trial, instead of making an application to vacate the judgment.[1]

Relief upon the ground of unavoidable casualty or misfortune may be had because of the insanity of the moving party,[2] or his illness,[3] or the illness of his counsel,[4] or because of a railway accident preventing his being at the trial.[5] It is fatal to the claim for relief that a casualty or misfortune, conceding it to have existed, would not have injured the applicant had he exercised reasonable diligence, after it happened, in preparing for trial or otherwise attending to his interests.[6] If one is ignorant of the English language, this will not excuse him from seeking information from those who understand it, and he cannot, after process is served upon him, which he did not understand, neglect to obtain any information concerning it, and after suffering judgment procure its vacation for unavoidable casualty or misfortune;[7] nor can a married woman disregard process served upon her, under the supposition that it did not relate to her individual rights, and by insisting that her supposition was an unavoidable casualty or misfortune, have the judgment against her set aside.[8]

[1] Breed *v.* Ketchum, 51 Wis. 164.
[2] Bean *v.* Hoffendorfer, 84 Ky. 685.
[3] Luscomb *v.* Maloy, 26 Iowa, 444; Brewer *v.* Holborn, 34 Iowa, 473; Gheer *v.* Huber, 32 Kan. 319.
[4] Snell *v.* Iowa Homestead Co., 67 Iowa, 405.
[5] Omro *v.* Ward, 19 Wis. 232.
[6] Izard County *v.* Huddleston, 39 Ark. 107.
[7] Heisterhagen *v.* Garland, 10 Mo. 66; Heathcote *v.* Haskins, 74 Iowa, 566.
[8] Teabout *v.* Roper, 62 Iowa, 603.

## CHAPTER VIII.

### VOID JUDGMENTS — INQUIRIES IN COLLATERAL PROCEEDINGS IN RELATION TO THE JURISDICTION OF COURTS OF RECORD.

§ 116. Description of void judgments.
§ 117. Effect of.
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§ 143. Jurisdiction limited to certain purposes.
§ 144. Disqualification of judges.
§ 145. Disqualification of judges at common law.
§ 146. Statutory prohibition.
§ 147. Judges sitting *pro forma*.
§ 148. Judges *de facto*.
§ 148 a. Judgment wrongfully altered.

§ 116. **Void Judgments.** — The judgment, being formally entered upon the record, and remaining unaffected

by any proceeding to vacate it in the case wherein it was pronounced, is likely to be offered as evidence in some other action or proceeding. The material inquiry then arising is, whether this professed determination of the rights of the parties is what it assumes to be, or whether, from some latent or patent infirmity, it is to be regarded as waste paper, — a mere *brutum fulmen*. The manner in which this inquiry should be conducted, and the sources from which information should be received, are subjects over which there has been, and there still is, much discussion and dissension, in which adverse conclusions have been announced on either side with an assurance approaching to dogmatism. No specific description of void judgments can be framed which does not conflict with the decisions of many of the courts. If a judgment is void, it must be from one or more of the following causes: 1. Want of jurisdiction over the subject-matter; 2. Want of jurisdiction over the parties to the action, or some of them; or 3. Want of power to grant the relief contained in the judgment. In pronouncing judgments of the first and second classes, the court acts without jurisdiction, while in those of the third class it acts in excess of jurisdiction. If the want of jurisdiction over either the subject-matter or the person appears by the record, or by any other admissible evidence, there is no doubt that the judgment is void. It has been said that a judgment is void if "it emanated from a court of limited jurisdiction not acting within its legitimate prerogative, or in a court of general jurisdiction, where the parties are not actually or by legal construction before the court and subject to its jurisdiction. Judgments of courts of general or competent jurisdiction are not considered under any circumstances as mere nullities, but as records importing absolute verity and of binding efficacy, until reversed by a competent appellate tribunal. They are voidable, not void."[1]

[1] Ponder *v.* Mosely, 2 Fla. 267; 48 Am. Dec. 194.

This language goes beyond what would anywhere be regarded as sound principle, if it is to be understood as asserting that *all* judgments of courts of general jurisdiction, having jurisdiction over the subject-matter, are valid. To hold a judgment binding, when the record disclosed a want of authority over the defendant, would be to impeach rather than to sustain the absolute verity of the record. Some judges, while refusing to permit any inquiry beyond the record, to show that a court, when pronouncing judgment, did not have jurisdiction over the defendants, have nevertheless said that a judgment without such jurisdiction is void, but that rules of evidence dictated by public policy exclude such testimony, not in the record, as is necessary to make its void nature apparent. But the word "void" can with no propriety be applied to a thing which appears to be sound, and which, while in existence, can command and enforce respect, and whose infirmity cannot be made manifest. If a judgment rendered, without in fact bringing the defendants into court, cannot be attacked collaterally on this ground, unless the want of authority over them appears in the record, it is no more void than if it were founded upon a mere misconception of some matter of law or of fact occurring in the exercise of an unquestionable jurisdiction.[1] In either case, the judgment can be avoided and made *functus officio* by some appropriate proceeding instituted for that purpose; but if not so avoided, must be respected and enforced.

§ 117. **Effect of Void Judgments.**—A void judgment is, in legal effect, no judgment.[2] By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless.[3] It neither binds nor bars any one. All acts

[1] Allen *v.* Huntington, 2 Aiken, 249; 16 Am. Dec. 702.

[2] Agnew *v.* Adams, 26 S. C. 101; Cain *v.* Goda, 84 Ind. 209; Paul *v.* Willis, 69 Tex. 261; Carron *v.* Martin, 26 N. J. L. 594; 69 Am. Dec. 584; Gray *v.* Fox, 1 N. J. Eq. 259; 22 Am. Dec. 508; Blanton *v.* Carroll, 84 Va. 539; Chicago etc. R. R. Co. *v.* Summers, 113 Ind. 10; 3 Am. St. Rep. 615.

[3] White *v.* Foote L. & M. Co., 29 W. Va. 385; 6 Am. St. Rep. 650; Furgeson *v.* Jones, 17 Or. 204; 11 Am. St. Rep. 808.

performed under it and all claims flowing out of it are void. The parties attempting to enforce it may be responsible as trespassers. The purchaser at a sale by virtue of its authority finds himself without title and without redress.[1] The first and most material inquiry in relation to a judgment or decree, then, is in reference to its validity. For if it be null, no action upon the part of the plaintiff, no inaction upon the part of the defendant,[2] no resulting equity in the hands of third persons, no power residing in any legislative or other department of the government,[3] can invest it with any of the elements of power or of vitality. It does not terminate or discontinue the action in which it is entered, nor merge the cause of action; and it therefore cannot prevent the plaintiff from proceeding to obtain a valid judgment upon the same cause, either in the action in which the void judgment was entered[4] or in some other action.[5]

§ 118. **Jurisdiction.** — "The power to hear and determine a cause is jurisdiction; it is *coram judice* whenever a case is presented which brings this power into action; if the petitioner states such a case in his petition, that on a demurrer the court would render judgment in his favor, it is an undoubted case of jurisdiction."[6] "Before this power can be affirmed to exist, it must be made to appear that the law has given the tribunal capacity to entertain the complaint against the person or thing sought to be charged or affected; that such complaint has been pre-

[1] Campbell *v.* McCahan, 41 Ill. 45; Roberts *v.* Stowers, 7 Bush, 295; Huls *v.* Buntin, 47 Ill. 397; Dane's Abr., c. 146, art. 5, secs. 1, 8; Sherrell *v.* Goodrum, 3 Humph. 430; Andrews *v.* State, 2 Sneed, 550; Hollingsworth *v.* Bagley, 35 Tex. 345; Morton *v.* Root, 2 Dill. 312; Com. Bank *v.* Martin, 9 Smedes & M. 613; Doe *v.* McDonald, 27 Miss. 610; Hargis *v.* Morse, 7 Kan. 417.

[2] Kramer *v.* Holster, 55 Miss. 243.

[3] Pryor *v.* Downey, 50 Cal. 388; 19 Am. Rep. 655; Maxwell *v.* Goetschius, 40 N. J. L. 383; 29 Am. Rep. 242; Freeman on Void Judicial Sales, sec. 56; Griffin *v.* Cunningham, 20 Gratt. 109; Lane *v.* Nelson, 79 Pa. St. 407; 3 Cent. L. J. 44; Denny *v.* Mattoon, 2 Allen, 361; 79 Am. Dec. 784; Israel *v.* Arthur, 7 Col. 5; McDaniel *v.* Correll, 19 Ill. 226; 68 Am. Dec. 587; Richards *v.* Rote, 68 Pa. St. 248.

[4] Moore *v.* Haskins, 66 Miss. 496.

[5] Western U. T. Co. *v.* Taylor, 84 Ga. 408; Linn *v.* Carson, 32 Gratt. 170.

[6] United States *v.* Arredonda, 6 Pet. 709.

ferred; and that such person or thing has been properly brought before the tribunal to answer the charge therein contained."[1] There must be a cause to be heard, and when the tribunal is a court of record, such cause must be submitted to it by a complaint in writing.[2] There can be no doubt that the filing of a petition or complaint, such as ought not to be deemed sufficient upon demurrer, may confer jurisdiction. The power to decide upon the sufficiency of a cause of action as presented by the complainant's pleading, like the power to decide any other legal proposition, though erroneously applied, is binding until corrected by some superior authority.[3] The definition of the word "jurisdiction" has undergone various judicial modifications within the past few years. It was formerly, as we have stated, defined to be the power to hear and determine. The supreme court of California, not entirely satisfied with this definition, said that "it is, in truth, the power to do both or either; to hear without determining, or to determine without hearing."[4] The later decisions of the supreme court of the United States introduce a new element in the description of jurisdiction, and, in effect, declare that it is the power and the willingness to hear and determine. "Wherever one is assailed in his person or his property, there he may defend; for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.[5] Where a court having jurisdiction

[1] Sheldon *v.* Newton, 3 Ohio St. 494.

[2] Beckett v. Cuenin, 15 Col. 281; 22 Am. St. Rep. 399; Young *v.* Rosenbaum, 39 Cal. 654.

[3] McNamara on Nullities, 137; Rowe *v.* Palmer, 29 Kan. 337; Paul *v.* Smith, 82 Ky. 451; Barnard *v.* Barnard, 119 Ill. 92; Plume *v.* Howard S. I., 46 N. J. L. 211; Cooper *v.* Sunderland, 3 Iowa, 114; 66 Am. Dec. 52; Wood *v.* Blythe, 46 Wis. 650.

[4] Ex parte Bennett, 44 Cal. 84.

[5] Windsor *v.* McVeigh, 93 U. S. 277; 4 Cent. L. J. 61.

over the subject-matter causes its process to be regularly issued and served upon the defendant, we should, but for the decision from which we have just quoted, consider that any irregular, erroneous, or even arbitrary act on its part — such, for instance, as striking out his answer, or otherwise refusing to consider his defense — would be no more than the erroneous exercise of its jurisdiction, and would therefore not endanger the validity of its judgment otherwise than by subjecting it to reversal on writ of error or appeal. But according to the reasoning of the supreme court, the issue and service of process is equivalent to a direction to the defendant to appear and present his defense for the consideration of the court, and its refusal, after he does so appear, to hear him or to permit him to assert his rights is, in legal effect, a revocation of its process, and thereafter it has no other jurisdiction over him than it had prior to the issuing of such process.[1] The statement that jurisdiction is the power to hear and determine is liable to produce the impression that where it exists any determination which the court may make is valid, though in excess of its powers and liable to be set aside by appeal or by some other correctory proceeding. The determination of an action is not confined to the decision of issues of law and fact and ordering judgment for one party and against another, but embraces the relief granted; and that there should be power to *grant the relief* specified in the judgment is as essential as that there should be power to entertain the action and dispose of the issues of law and fact therein. It is true that there is

[1] Windsor *v.* McVeigh, 93 U. S. 278. "It was not," said Mr. Justice Field, in this case, "within the power of the jurisdiction of the district court to proceed with the case so as to effect the rights of the owner after his appearance had been stricken out, and the benefit of the citation thus denied. For jurisdiction is the right to hear and determine, not to determine without hearing. And where, as in that case, no appearance was allowed, there could be no hearing or opportunity of being heard, and therefore could be no exercise of jurisdiction. By the act of the court, the respondent was excluded from its jurisdiction." Justices Miller, Bradley, and Hunt dissented. Judge Field, at page 283, refers to various instances which, in his judgment, involve such a departure from the established modes of procedure as to render a judgment void.

great difficulty in formulating any test by which to determine whether a judgment granting relief other or in excess of that authorized by law may be disregarded as void, or must be treated as valid until vacated by appeal or otherwise; but that it is possible for a court having jurisdiction both of the subject-matter of and of the parties to an action to pronounce a judgment so far in excess of its powers as to be wholly or partly void, we think must be conceded.[1]

§ 118 a. **Conflicting Concurrent Jurisdiction.**—It may happen that while an action is pending, over the subject-matter and parties to which the court has jurisdiction, another action is commenced, to which the same persons are parties, in another court, involving the same subject-matter, and it may further happen that both actions proceed to judgment and that the judgments are wholly irreconcilable. If so, then the question arises, To which shall be given precedence? The authorities agree that when a court has obtained jurisdiction over an action, it is entitled to pursue such jurisdiction to final judgment, and that, its jurisdiction cannot be divested by the bringing of another action in a court of concurrent jurisdiction, and that, notwithstanding the bringing of the second action, the court first acquiring jurisdiction will not hesitate to proceed, irrespective of what may be done in the other action by the other court.[2] So far as we are aware, no instance has ever occurred in which the court last acquiring jurisdiction has proceeded to judgment and sought to enforce such judgment notwithstanding the pendency of the prior action. Generally, the conflict of jurisdiction is avoided by suggesting to the second court the fact that

[1] See *post*, sec. 120 c.

[2] Sharon *v.* Terry, 13 Saw. 387; Wallace *v.* McConnell, 13 Pet. 136; Taylor *v.* Taintor, 16 Wall. 366; Shoemaker *v.* French, Chase Dec. 267; Gaylord *v.* Ft. Wayne etc. R. R. Co., 6 Biss. 286; Union M. L. I. Co. *v.* Chicago, 10 Biss. 191; Bank of Bellows Falls *v.* Rutland R. R. Co., 28 Vt. 470; Home Ins. Co. *v.* Howell, 24 N. J. Eq. 239; Brooks *v.* Delaplaine, 1 Md. Ch. 354; Merrill *v.* Lake, 16 Ohio, 373; 47 Am. Dec. 377; Chapin *v.* James, 11 R. I. 86; 23 Am. Rep. 412; Keating *v.* Spink, 3 Ohio St. 105; 62 Am. Dec. 214; Haines *v.* Rawson, 40 Ga. 356; 2 Am. Rep. 581; Griffin *v.* Brinkhead, 84 Va. 612.

another court had previously acquired jurisdiction of the controversy, and that, to avoid any unseemly conflict, the trial of the second action should be stayed until the first is disposed of; and in some instances, parties instituting the second action have been enjoined from its further prosecution. Still, it may happen that when one of the national courts has acquired jurisdiction of an action, one of the parties thereto may thereafter resort to a state court and there commence an action against his adversary, involving the same subject-matter, and thus attempt to transfer the controversy to the state courts; and the latter may, notwithstanding any objections made, insist upon proceeding to trial and judgment. In this event, will its judgment be valid, or not? This question seemed about to arise in a very celebrated case, but its decision was finally rendered unnecessary by the reversal of the judgment of the state court. So far as any opinion was expressed upon the subject in this case, the courts of the state inclined to the view that their judgment was not void,[1] while the national courts, on the other hand, were obviously determined, if necessary, to entirely disregard it.[2] It seems impossible that two courts can, at the same time, possess the power to make a final determination of the same controversy between the same parties. If either has authority to act, its action must necessarily be exclusive, and therefore it is our judgment that whenever either the state or the national courts acquire jurisdiction of an action and the parties thereto, this jurisdiction cannot be destroyed, diminished, or suspended by one of the parties bringing an action in another court, and that any judgment or order of the latter court is void so far as it conflicts with any judgment or order of the court first acquiring jurisdiction.

§ 119. **Sources of Jurisdiction.** — Jurisdiction is conferred upon courts by the constitution and laws of the

[1] Sharon *v.* Sharon, 79 Cal. 633. [2] Sharon *v.* Terry, 13 Saw. 387.

country in which they are situate, "authorizing them to hear and determine causes between parties, and to carry their judgments into effect."[1] Jurisdiction over the subject-matter is a condition precedent to the acquisition of authority over the parties, and is conferred by the "authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred." The jurisdiction of a court over a particular question or subject-matter is generally dependent on the act of the parties, or of some of them. Though either the constitution, the statute, or the common law, or all combined, confer upon courts authority to hear and determine causes, they are not ordinarily authorized to act unless some petition or complaint, oral or written, is presented to them and relief sought from them because of the matters stated therein. Jurisdiction over the person is obtained by service of process within the jurisdiction of the court, or in some other manner authorized by law, as by the voluntary appearance of a party during the progress of a cause. Jurisdiction over the *res* "is obtained by its seizure under process of the court,"[2] and, as we shall hereafter see, is sometimes conceded to exist though no seizure is made, as where process is served constructively, by publication or otherwise.[3]

§ 120. **Jurisdiction over the Subject-matter.** — A judgment pronounced by a tribunal having no authority to determine the matter in issue is necessarily and incurably void, and may be shown to be so in any collateral or other proceeding in which it is drawn in question.[4] A criminal information in the court of common pleas, or a common recovery or writ of right in the king's bench,

[1] Withers *v.* Patterson, 27 Tex. 491; 86 Am. Dec. 643.

[2] Cooper *v.* Reynolds, 10 Wall. 308.

[3] *Post*, sec. 120 a.

[4] Gilliland *v.* Seller's Adm'r, 2 Ohio St. 223; Morse *v.* Presby, 5 Fost. 299; Eaton *v.* Badger, 33 N. H. 228; Wamsley *v.* Robinson, 28 La. Ann. 793; Ponce *v.* Underwood, 55 Ga. 601; Lyles *v.* Bolles, 8 S. C. 258; Western U. T. Co. *v.* Taylor, 84 Ga. 408; Beverly *v.* Burke, 9 Ga. 440; 54 Am. Dec. 351; Swiggart *v.* Harber, 4 Scam. 364; 39 Am. Dec. 418; St. Louis & S. C. Co. *v.* Sandoval C. Co., 111 Ill. 32; Frankel *v.* Satterfield, 19 Atl. Rep. 898 (Del.).

would be simply void, and could not even be pleaded in justification by the officer of the court who executed it.[1] When a tribunal has not jurisdiction over the subject-matter, no averment can supply the defect; no amount of proof can alter the case. As power over the subject-matter is given by law, nothing but an additional grant from legislative authority can extend that power over a class of cases formerly excepted; and neither the acquiescence of the parties, nor their solicitations, can authorize any court to determine any matter over which the law has not authorized it to act.[2] The grant of jurisdiction must proceed from competent authority. Where a court acts under and by virtue of a certain act, and such act is unconstitutional, its judgments are void. The jurisdiction resting on the act, and the act resting on no sufficient support, both must fall.[3] Jurisdiction, being conferred by the laws of a state or country, is necessarily confined within the territorial limits in which such laws are operative. Lands and other property situate in another state or country are not within the jurisdiction of the courts of this state, and cannot be directly affected by their judgments.[4] If, however, the court has jurisdiction of the action and the parties, and is competent to give part of the relief granted, its judgment, so far as within its powers, is valid. Therefore a judgment enforcing a mechanic's lien may, on the

[1] Moore *v.* Houston, 3 Serg. & R. 169; Williamson's Case, 26 Pa. St. 9, 18; Case of the Marshalsea, 10 Coke, 68, 76.

[2] Dicks *v.* Hatch, 10 Iowa, 380; State *v.* Fosdick, 21 La. Ann. 258; Mora *v.* Kuzac, 21 La. Ann. 754; Moore *v.* Ellis, 18 Mich. 77; Damp *v.* Town of Dane, 29 Wis. 419; Richardson *v.* Hunter, 23 La. Ann. 255; Peabody *v.* Thatcher, 3 Col. 275; Fleischman *v.* Walker, 91 Ill. 318; Block *v.* Henderson, 82 Ga. 23; 14 Am. St. Rep. 138; Burnley *v.* Cook, 13 Tex. 586; 65 Am. Dec. 79; Stanton *v.* Ballard, 133 Mass. 465; Home Ins. Co. *v.* Morse, 20 Wall. 451.

[3] In re Fourth Drainage Dist., 34 La. Ann. 97; Irwin's Succession, 33 La. Ann. 63; Reed *v.* Wright, 2 G. Greene, 15. In Dower *v.* Johnson, 9 Rep. 329, 100 U. S. 158, the supreme court of the United States declared void a judgment of one of the courts of Louisiana, rendered against an officer in the military service of the United States, for injuries resulting from the execution of orders issued by him as such officer, on the ground that the courts of an invaded nation have no jurisdiction to compel the officers and soldiers of the invading army to account to them civilly or criminally.

[4] Wimer *v.* Wimer, 82 Va. 890; 3 Am St. Rep. 126; Lindley *v.* O'Reilly, 50 N. J. L. 636; 7 Am. St. Rep. 802.

law conferring the lien being adjudged unconstitutional, be treated as valid as a personal judgment against the defendant.[1] It is essential that the jurisdiction of the court over a subject-matter be called into action by some party and in some mode recognized by law. A court does not have power to render judgment in favor of one as plaintiff if he has never commenced any action or proceeding calling for its action,[2] nor has it, as a general rule, power to give judgment respecting a matter not submitted to it for decision, though such judgment is pronounced in an action involving other matters which have been submitted to it for decision and over which it has jurisdiction.[3] A petition or complaint must be filed in the court whose action is sought, or otherwise presented for its consideration in some mode sanctioned by law. If it is filed in one court and there dismissed, and the plaintiff thereupon changes the file-marks so as to make it appear to have been filed in another court and at a later date, but without changing its caption or other contents, it still remains a petition to the court to which it was originally presented, and does not invest the other court with any jurisdiction over the subject-matter of such petition.[4] It is not, however, essential to the jurisdiction of the court that the complaint in action be filed within the time required by law,[5] nor by a person entitled to maintain the action. Hence a judgment in partition is valid though the plaintiff, while he was a proper party defendant, was not entitled to maintain the action.[6] The rule that a judgment is absolutely void if pronounced by a court not having jurisdiction of the subject-matter is equally applicable whether the judgment proceeded from a court of general or of special, of foreign or of domestic, jurisdiction, and whether the judgment is questioned

[1] Koepke *v.* Dyer, 89 Mich. 311.
[2] Dunlap *v.* Southerlin, 63 Tex. 38.
[3] Mundy *v.* Vail, 34 N. J. L. 418; Reynolds *v.* Stockton, 43 N. J. Eq. 211; 3 Am. St. Rep. 305; Seamster *v.* Blackstock, 83 Va. 232; 5 Am. St. Rep. 262.
[4] Jordan *v.* Brown, 71 Iowa, 421.
[5] Hildreth *v.* Harney, 62 Iowa, 420.
[6] Reed *v.* Reed, 107 N. Y. 545.

directly or collaterally. But courts not having jurisdiction over a subject-matter may, when an improper case is attempted to be litigated before them, determine their own want of jurisdiction, and, as incident to that determination, may render judgment for costs.[1]

Instances of want of jurisdiction over the subject-matter are found more frequently in probate proceedings than elsewhere. If the statute of a state governing the settlement and distribution of the estates of deceased persons makes no provision concerning the estates of persons who died prior to the passage of such statute, then an attempt to administer on one of the last-named estates is a usurpation of authority over a subject-matter not within the jurisdiction of the court, and the proceedings are therefore invalid.[2] So if a probate court should make an order for the sale of property situate in another state than the one in which the order is made, this would also be an assumption of authority over a subject-matter not within the jurisdiction of the court, and would be void.[3] This rule has been held to be applicable even where personal property, though in another state at the death of its owner, was subsequently brought within the state where the order was made.[4] Courts of probate have no power to grant letters of administration, nor letters testamentary, on the estate of a living person. Letters may be granted, under a mistake of fact, upon the supposition that the testator or other person is dead. The case is nevertheless one in which the court has no jurisdiction. If he who was supposed to have died is in fact living, all probate sales and other proceedings are void, and can have no

[1] King *v.* Poole, 36 Barb. 242; Gormly *v.* McIntosh, 22 Barb. 271; Jordan *v.* Dennis, 7 Met. 590; Blair *v.* Cummings, 39 Cal. 667; Burke *v.* Jackson, 22 Ohio St. 268.

[2] Downer *v.* Smith, 24 Cal. 114; Coppinger *v.* Rice, 33 Cal. 408; Grimes *v.* Norris, 6 Cal. 621; 65 Am. Dec. 545; Adams *v.* Norris, 23 How. 353; Tevis *v.* Pitcher, 10 Cal. 465; McNeil *v.* First Congregational Society, 4 West Coast Rep. 421; 66 Cal. 105.

[3] Nowler *v.* Coit, 1 Ohio, 519; 13 Am. Dec. 640; Salmond *v.* Price, 13 Ohio, 368; 42 Am. Dec. 204; Watts *v.* Waddle, 6 Pet. 389; Wills *v.* Cowper, 2 Ohio, 124; Latimer *v.* R. R. Co., 43 Mo. 105; 97 Am. Dec. 378; Price *v.* Johnson, 1 Ohio St. 390.

[4] Varner *v.* Bevil, 47 Ala. 286.

effect on his title.[1] Grants of letters of administration were formerly judged to be void unless the deceased did in fact die intestate.[2] Surrogate and probate courts are usually limited in their jurisdiction to a specified class of cases. Thus it is generally required that a man's estate be settled in the county where he resided at the time of his death. If it appears that letters testamentary or of administration were granted in a county in which the deceased did not reside, the whole proceedings must be regarded as void.[3] How and in what circumstances this fact may be made to appear are questions to which diverse answers may be found in the authorities. Undoubtedly the records of the court may be inspected. If they show the non-residence of the deceased, they are competent evidence of their own invalidity. If they fail to assert anything about the residence, either in the averments of the petition or in the findings of the court, we should judge this to be fatal. In every case it ought to appear, *prima facie*, that the court has jurisdiction over the estate.

[1] Duncan *v.* Stewart, 25 Ala. 408; 60 Am. Dec. 527; Griffith *v.* Frazier, 8 Cranch, 9; Fisk *v.* Norvel, 9 Tex. 13; 58 Am. Dec. 128; Jochumsen *v.* Suffolk Sav. Bank, 3 Allen, 87; Withers *v.* Patterson, 27 Tex. 496; 86 Am. Dec. 643; Beckett *v.* Selover, 7 Cal. 215; 68 Am. Dec. 237. But a majority of the court of appeals of New York declared, in Roderigas *v.* East River Sav. Inst., 63 N. Y. 460, 20 Am. Rep. 555, that a grant of administration upon the estate of a living person was not void; but see a further decision in the same case, 76 N. Y. 316; 32 Am. Rep. 309.

[2] Holyoke *v.* Haskins, 5 Pick. 24; 16 Am. Dec. 372; Brock *v.* Frank, 51 Ala. 91; Kane *v.* Paul, 14 Pet. 39; Griffith *v.* Frazier, 8 Cranch, 24. This rule is believed to be obsolete in the United States. In its stead we have adopted the rule that a grant of administration, made by a court having jurisdiction of the subject-matter and of the particular case, while it remains unrevoked, cannot be regarded as void. "Nor can the recall or the repeal of the appointment be fairly regarded as placing the appointees of the court in the same position as if the decree never existed. On the contrary, all acts done in the due course of administration, while such decrees remained in force, must be held entirely valid": Redfield on Wills. pt. 2, p. 109; Bigelow *v.* Bigelow, 4 Ohio, 138; 19 Am. Dec. 597; Kittredge *v.* Folsom, 8 N. H. 98; Ward *v.* Oakes, 42 Ala. 225; Jennings *v.* Moses, 38 Ala. 402; Broughton *v.* Bradley, 34 Ala. 694; 73 Am. Dec. 474; Brock *v.* Frank, 51 Ala. 91. But one who deals with an executor is not protected if he has notice of the existence of a later will than the one admitted to probate: Gaines *v.* De la Croix, 6 Wall. 720.

[3] Beckett *v.* Selover, 7 Cal. 215; 68 Am. Dec. 237; Haynes *v.* Meeks, 10 Cal. 110; 70 Am. Dec. 703; Harlan's Estate, 24 Cal. 182; 85 Am. Dec. 58; Moore *v.* Philbrick, 32 Me. 102; 52 Am. Dec. 642; Munson *v.* Newson, 9 Tex. 109; Cutts *v.* Haskins, 9 Mass. 543; Holyoke *v.* Haskins, 5 Pick. 20; 9 Pick. 259; 16 Am. Dec. 372; Goodrich *v.* Pendleton, 4 Johns. Ch. 549.

Usually a petition is presented to the court or judge, in which the facts authorizing the assumption of jurisdiction in the particular case are stated. The duty of the court or judge is to investigate and determine the truth of these jurisdictional allegations. Its subsequent grant of letters implies that these allegations have been found to be true. Hence in a case where a probate court has, upon a petition asserting the essential jurisdictional facts, and after notice to the parties in interest, given in the manner prescribed by law, granted letters testamentary or of administration, the proceedings cannot be avoided collaterally, in the majority of the states, by proof that the deceased did not die within the jurisdiction of the court.[1] Any other rule would lead to the most embarrassing results. The residence of a deceased person can be determined only by hearing parol evidence. Different judges may reach opposite conclusions from the same evidence. The parties in interest may at separate times produce different evidence on the same issue. If, after a court had heard and decided the issue concerning the residence of the deceased, the question remained unsettled to such an extent that it could be relitigated for the purpose of avoiding all the proceedings of the court, no person would have the temerity to deal with executors or administrators.

§ 120 a. **Jurisdiction over the Person** of plaintiff or complainant is acquired by his suing out some writ or presenting to the court a petition or complaint; or, in other words, by his voluntarily submitting his cause to its decision. The defendant may also give the court jurisdiction by his voluntary action, as where he appears by his answer, or in some other mode recognized by law.[2]

[1] Irwin *v.* Scribner, 18 Cal. 499; Lewis *v.* Dutton, 8 How. Pr. 103; Andrews *v.* Avery, 14 Gratt. 236; 72 Am. Dec. 355; Warfield's Estate, 22 Cal. 51; 83 Am. Dec. 49; Sutton *v.* Sutton, 13 Vt. 71; Fisher *v.* Bassett, 9 Leigh, 119; 33 Am. Dec. 227; Barrett *v.* Garney, 33 Cal. 530; Driggs *v.* Abbott, 27 Vt. 581; 65 Am. Dec. 214; Burdett *v.* Silsbee, 15 Tex. 615; Monell *v.* Dennison, 17 How. Pr. 422; Abbott *v.* Coburn, 28 Vt. 663; 67 Am. Dec. 735; Rarborg *v.* Hammond, 2 Har. & G. 42. See also Riley *v.* McCord, 24 Mo. 265; Wight *v.* Wallbaum, 39 Ill. 554.

[2] Letney *v.* Marshall, 79 Tex. 513.

If he does not do so voluntarily, then, before the court can rightfully exercise jurisdiction over him, it must be authorized to require him to appear before it and submit to its judgment in the action or proceeding, and its process requiring such appearance must be issued and served upon him in substantial compliance with the law. As a general rule, the authority of the courts of every state or nation is restricted to the territory of such state or nation, and they have no power to require persons not within such territory to appear before them. Therefore, any personal judgment which a state court may render against one who did not voluntarily submit to its jurisdiction, and who is not a citizen of the state, nor served with process within its borders, no matter what the mode of service, is void, because the court had no jurisdiction over his person.[1] To this rule there is this apparent exception: If a court has jurisdiction over an action and the parties thereto, with power to render, and it in fact does render, a valid judgment therein, from which the losing party has a right to appeal, such process as may be required to prosecute an appeal to the appellate court may be served on a non-resident respondent, and if so served, the judgment of the appellate court based thereon is valid.[2]

All persons residing or being within a state are subject to the jurisdiction of its courts, whether their residence is temporary or permanent; so that process served upon them within its territory is as effectual to confer jurisdic-

[1] Ewer *v.* Coffin, 1 Cush. 23; 48 Am. Dec. 587; Lovejoy *v.* Albee, 33 Me. 414; 54 Am. Dec. 630; Martin *v.* Cobb, 77 Tex. 544; Latimer *v.* Union Pac. R'y Co., 43 Mo. 105; 97 Am. Dec. 378; Paxton *v.* Daniell, 23 Pac. L. Rep. 441 (Wash.); Cudabec *v.* Strong, 67 Miss. 705; Kimmarle *v.* Houston etc. R. R. Co., 76 Tex. 686; Barrett *v.* McAllister, 33 W. Va. 738; De Meli *v.* De Meli, 120 N. Y. 485; 17 Am. St. Rep. 652; Sowders *v.* Edmunds, 76 Ind. 123; Shepard *v.* Wright, 113 N. Y. 582; Mickey *v.* Stratton, 5 Saw. 475; Eliot *v.* McCormick, 144 Mass. 10; Eastman *v.* Dearborn, 63 N. H. 364. Silver *v.* Luck, 42 Ark. 268; Pennoyer *v.* Neff, 95 U. S. 714; Hall *v.* Williams, 6 Pick. 232; 17 Am. Dec. 356; Folger *v.* Columbian Ins. Co., 99 Mass. 267; 96 Am. Dec. 747; Price *v.* Hickok, 39 Vt. 292; McEwen *v.* Zimmer, 38 Mich. 765; 31 Am. Rep. 332; Lutz *v.* Kelly, 47 Iowa, 307; Smith *v.* Eaton, 36 Me. 298; 58 Am. Dec. 746; Hart *v.* Sansom, 110 U. S. 151.

[2] Nations *v.* Johnson, 24 How. 195.

tion on a court as if they were citizens,[1] unless they are ambassadors, other public ministers, or consuls or vice-consuls of a foreign nation, in which event the jurisdiction of the national courts is exclusive, and though they appear in such courts in response to process served upon them, and answering the complaint, proceed to trial upon the merits, they may at any time avoid the judgment by suggesting that the court did not have jurisdiction over them.[2] The place of residence of a foreign minister or ambassador is not regarded as a part of the state for the purpose of conferring jurisdiction on the state courts over him, his diplomatic attendants, or his family or servants, all of whom are exempt from the jurisdiction of the state.[3]

All property within a state is subject to the jurisdiction of its courts,[4] and they have the right to adjudicate the title thereto, to enforce liens thereupon, and to subject it to the payment of the debts of its owners, whether residents or not. It must be confessed that it is somewhat difficult, upon principle, to reconcile this statement with the rule that a court has no jurisdiction over persons who are neither citizens nor residents of the state whose tribunal it is. This difficulty has been solved by regarding as *quasi* proceedings *in rem* all actions or proceedings the direct object of which is to affect the title,[5] or to enforce liens upon property, or to make it contribute to the satisfaction of such judgment as may be recovered. Therefore a judgment in partition,[6] or setting aside a conveyance

[1] Mowry *v.* Chase, 100 Mass. 79; Sturgis *v.* Fay, 16 Ind. 429; 79 Am. Dec. 440; Downer *v.* Shaw, 22 N. H. 277; Murphy *v.* Winter, 18 Ga. 600; March *v.* Eastern R. R. Co., 40 N. H. 548; 77 Am. Dec. 732; Molyneux *v.* Seymour, 30 Ga. 440; 76 Am. Dec. 662; Alley *v.* Caspari, 80 Me. 234; 6 Am. St. Rep. 178.

[2] Miller *v.* Van Loben Sels, 66 Cal. 341; Boers *v.* Preston, 111 U. S. 256.

[3] United States *v.* Benner, Bald. 234; Ex parte Cabrera, 1 Wash. C. C. 232; United States *v.* Lafontaine, 4 Cranch C. C. 173.

[4] Sturgis *v.* Fay, 16 Ind. 429; 79 Am. Dec. 440; United States *v.* Fox, 94 U. S. 315; Arndt *v.* Griggs, 116 U. S. 151; Castrique *v.* Imrie, L. R. 4 H. L. 414.

[5] Applegate *v.* Lexington etc., 117 U. S. 266; Loaiza *v.* Superior Court, 85 Cal. 11; 20 Am. St. Rep. 197; Young *v.* Upshur, 42 La. Ann. 362; 21 Am. St. Rep. 381; Hee Fritter *v.* Elizabeth Oil Co., 112 U. S. 301.

[6] Williams *v.* Westcott, 77 Iowa, 332; 14 Am. St. Rep. 287; Wunstel *v.* Landry, 39 La. Ann. 312; Taliaferio *v.* Butler, 77 Tex. 578.

as fraudulent,[1] or for specific performance of a contract to convey real estate,[2] or condemning lands in the exercise of the right of eminent domain,[3] or foreclosing liens, or determining conflicting claims to real estate and quieting title thereto,[4] is valid even against non-residents, though based upon constructive service of process. So where an action is to enforce a pecuniary liability, and during its pendency the property is levied upon under a writ of attachment issued therein, whether by taking it into the actual possession of the attaching officer or not, and the defendant is a non-resident constructively served with process, the judgment against him is so far valid that it may be enforced by the sale of the property attached, though in all other respects it is inoperative.[5] In actions of this class, as authorized by the statutes in most of the states, though property is attached, the service of process, by publication or otherwise, is essential to confer jurisdiction to enter judgment, and a judgment without such service is void.[6] In all cases in which a defendant does not voluntarily appear, service of process upon him in some mode authorized by law is indispensable, and if it appears, even in a collateral proceeding, that any judgment has been rendered against one who has neither voluntarily appeared nor been served with process, it must be treated as void.[7]

[1] Adams *v.* Cowles, 95 Mo. 501; 6 Am. St. Rep. 74; Lane *v.* Innes, 43 Minn. 136.

[2] Boswell's Lessee *v.* Otis, 9 How. 336; Felch *v.* Hooper, 119 Mass. 52.

[3] Huling *v.* Kaw Valley R. R. Co., 130 U. S. 559.

[4] Arndt *v.* Griggs, 134 U. S. 316; Watson *v.* Ulbrich, 18 Neb. 189; Cloyd *v.* Trotter, 118 Ill. 391; Essig *v.* Lower, 120 Ind. 239; Perkins *v.* Wakeham, 86 Cal. 580; 21 Am. St. Rep. 67; Venable *v.* Dutch, 37 Kan. 515; 1 Am. St. Rep. 260; Bennett *v.* Fenton, 41 Fed. Rep. 283.

[5] Anderson *v.* Goff, 72 Cal. 65; 1 Am. St. Rep. 34; Eastman *v.* Wadleigh, 65 Me. 251; 20 Am. Rep. 695; Tabler *v.* Mitchell, 62 Miss. 437; Lovejoy *v.* Albee, 33 Me. 414; 54 Am. Dec. 630; Easterly *v.* Goodwin, 35 Conn. 273; 95 Am. Dec. 327; Johnson *v.* Dodge, 19 Iowa, 106; Payne *v.* Witherspoon, 14 B. Mon. 270; Stone *v.* Meyers, 9 Minn. 308; 86 Am. Dec. 101; Freeman *v.* Alderson, 119 U. S. 185.

[6] Great W. M. Co. *v.* Woodmas etc. Co., 12 Col. 46; 13 Am. St. Rep. 204; Barber *v.* Morris, 37 Minn. 194; 5 Am. St. Rep. 836.

[7] Farmer *v.* Hafley, 38 La. Ann. 232; Boyd *v.* Roane, 49 Ark. 397; Earl *v.* Cureton, 13 S. C. 19; Condry *v.* Cheshire, 88 N. C. 375; Dorr *v.* Rohr, 82 Va. 359; 3 Am. St. Rep. 106; Gregory *v.* Stetson, 133 U. S. 579; Cassidy *v.* Woodward, 77 Iowa, 355; Duncan *v.* Gerdine, 59 Miss. 550; Arthur *v.* Israel, 15 Col. 147.

If there are two or more defendants, there is no authority to enter judgment against all until all have been served, unless it can be found in the provisions of some statute in force in the state;[1] and though there is such a statute in existence, before judgment affecting one not served can be validated by it, it must appear that the action or proceeding in which it was rendered was prosecuted under and in conformity to such statute.[2] If a partnership is doing business in a state or country of which some of its members are non-residents, there is no doubt that upon service of process upon the resident defendants a judgment may be entered which will bind them personally and be enforceable against the partnership assets found within the jurisdiction of the court.[3] It has been contended that a statute authorizing judgment to be entered against a partnership, or against persons jointly indebted, on service of process on some only of the persons jointly liable, enforceable against those served and against the joint property of all, is unconstitutional, on the ground that it deprives those not served of property without the process of law. That a judgment cannot be given any effect against a partner or other joint debtor personally must be conceded in all cases where it clearly appears that process has not been served upon him, and he has not voluntarily appeared in the action. It will not support a levy made on his individual property nor an action against him to obtain another judgment, nor will it even stop the running of the statute of limitations.[4] It is also doubtful whether, in case the defendants are joint debtors merely, a judgment against all, based upon personal service upon some only, can be enforced against property which they own as co-tenants, so as to deprive a defendant not served,

[1] Gaiennie *v.* Akin, 17 La. 42; 36 Am. Dec. 604; Hall *v.* Lanning, 91 U. S. 166; Landsbreg *v.* Bullock, 79 Mich. 278; Proctor *v.* Lewis, 50 Mich. 329; Junkans *v.* Bergin, 64 Cal. 203.

[2] Davidson *v.* Knox, 67 Cal. 143; Garden S. & M. I. W. *v.* Davidson, 73 Cal. 389; Hamilton *v.* Rogers, 67 Mich. 135.

[3] Winters *v.* Means, 25 Neb. 241; 13 Am. St. Rep. 489; Leese *v.* Martin, L. R. 13 Eq. 77; Gunzberg *v.* Jacobson, 39 Mich. 80.

[4] Tay *v.* Hawley, 39 Cal. 95; Bruen *v.* Bokee, 4 Denio, 56; 47 Am. Dec. 239.

of his share or interest in such property; but as to a partnership, it is competent for the legislature of a state to authorize a judgment to be entered against it upon service of process upon any one or more of the partners, enforceable against the partnership property and the individual property of the partners so served.[1]

Various questions may arise as to whether facts claimed to constitute an alleged appearance, or service of process, are sufficient to bring the defendant within the jurisdiction of the court. We cannot undertake to here state fully what will be deemed an appearance by a defendant nor what a sufficient service of process upon him. It has been held that the fact that one was made a party defendant on his own motion did not authorize the entry of his default without any further notice or process;[2] that a motion to set aside judgment and for leave to plead, if denied, left the question of jurisdiction just as it was before;[3] and that the overruling of a motion for a new trial cannot cure a default void for want of jurisdiction, unless it appears that the motion was made or authorized by the defendant.[4] It is obvious that any proceeding taken by a defendant for the purpose of obtaining relief from a judgment, on the ground that it was rendered against him without first acquiring jurisdiction over him, and any appearance made professedly for a special purpose, ought not to be held to give the court jurisdiction over the defendant, except to the extent of hearing and determining the question which he specially presents to it for consideration.

As a general rule, the jurisdiction of courts in an action is confined to the parties thereto, and must be procured in some mode sanctioned by law. Though there are rights and causes of action arising out of or connected

[1] Patten *v.* Cunnington, 63 Tex. 666; Burnett *v.* Sullivan, 58 Tex. 535; Johnson *v.* Lough, 22 Minn. 203; Harker *v.* Brink, 24 N. J. L. 333; Sugg *v.* Thornton, 132 U. S. 524.

[2] Fagan *v.* Barnes, 14 Fla. 53.

[3] Cloud *v.* Pierce City, 86 Mo. 357.

[4] Martin *v.* Cobb, 77 Tex. 544; Godfrey *v.* Valentine, 39 Minn. 336; 12 Am. St. Rep. 657.

with the action before the court, it has not, unless authorized by statute, power to compel the attendance of persons before it by notice or citation, and to give such judgments against them as might be proper in an action instituted against them and conducted in conformity with the law governing such action. Hence where one who had become a surety on the bond of a purchaser at a judicial sale was upon motion and notice brought before the court, and a judgment thereupon entered against him, it was adjudged to be void because not in conformity to established modes of procedure.[1]

§ 120 b. **Jurisdiction over Corporations.** — A corporation, for the purposes of a suit, is a person, and, like a natural person, may be either resident or non-resident. Its residence is in the state under whose laws it was created,[2] and there it may be served with process in such mode as the laws of the state prescribe.[3] As long as a corporation confines its business to the state of which it is by law a resident, the courts of other states can exercise no jurisdiction over it, except to the same extent as over other non-residents. If its officers go into another state, they do not take it with them, and service of process upon them there cannot confer upon its courts jurisdiction to render a judgment against it which can be enforced elsewhere, but may probably operate as a constructive service, sufficient, in connection with the attachment of its property within the state, to support a judgment enforceable out of the property so attached.[4] So far as a foreign

[1] Anthony *v.* Kasey, 83 Va. 338; 5 Am. St. Rep. 277; Thurman *v.* Morgan, 79 Va. 367.

[2] Railway Co. *v.* Whitton, 13 Wall. 270; St. Clair *v.* Cox, 106 U. S. 350; Western U. T. Co. *v.* Dickinson, 40 Mo. 444; 13 Am. Rep. 295.

[3] New Albany & S. R. R. Co. *v.* Tilton, 12 Ind. 3; 74 Am. Dec. 195. The service of process must necessarily be upon the officers and other agents of a corporation, because there is no tangible principal to whom it can be delivered. For a discussion of the question upon what agents of a corporation process against it must be served see note to Hampson *v.* Weare, 66 Am. Dec. 119.

[4] Peckham *v.* North Parish, 16 Pick. 286; Latimer *v.* U. P. R'y, 43 Mo. 105; 97 Am. Dec. 378; State *v.* Ramsey Dist. Ct., 26 Minn. 234; McQueen *v.* Middletin M. Co., 16 Johns. 5.

corporation has or claims property within a state, we doubt not that its courts may authorize actions affecting the title to or enforcing liens against such property, to the same extent as if the corporation were a non-resident natural person. A corporation, like a natural person, may voluntarily subject itself to the jurisdiction of a court, either by commencing an action therein or by appearing in an action against it, without objecting to the jurisdiction of the court, and having done so, is bound by the judgment to the same extent as a natural person, whether the court could have rightfully exercised jurisdiction against its objections or not.[1]

If a corporation is authorized by the laws of a state, other than that of its creation, to do business in the former, and to there have the same privileges and exercise the same powers as in the state of its creation, and it avails itself of the privileges and exercises the powers thus conceded, it consents to the assumption by the courts of the former state of jurisdiction over it in proceedings arising out of transactions within its territory;[2] and we apprehend that if a corporation engages in business in another state than that of its creation, even in the absence of any express authorization by law, its courts may acquire jurisdiction over such corporation by service of process on its resident agents in the mode provided by the local laws.[3] In many of the states, statutes have been enacted by which foreign corporations are forbidden to do business therein unless they first designate some officer or agent upon whom service of process against them may be made. If a corporation, pursuant to such statute,

[1] Pierce *v.* Equitable L. A. Soc., 145 Mass. 146; 1 Am. St. Rep. 433; North M. R. R. Co. *v.* Akers, 4 Kan. 388; 96 Am. Dec. 183; March *v.* Eastern R. R. Co., 46 N. H. 548; 77 Am. Dec. 732.

[2] Baltimore & O. R. R. *v.* Gallahue's Adm'r, 12 Gratt. 655; 68 Am. Dec. 254; Railroad Co. *v.* Harris, 12 Wall. 65.

[3] Lafayette Ins. Co. *v.* French, 18 How. 404; Mineral Point R. R. *v.* Keep, 22 Ill. 9; 74 Am. Dec. 124; Hannibal R. R. *v.* Crane, 102 Ill. 254; Bawknight *v.* L. S. & G. M. Co., 55 Ga. 195; Merriwether *v.* Bank of Hamburg, Dud. (Ga.) 36; Hartford C. F. I. Co. *v.* Carriage, 40 Ga. 670; Moulin *v.* Insurance Co., 24 N. J. L. 24; Colorado I. W. *v.* Sierra Grande M. Co., 15 Col. 499; 22 Am. St. Rep.; Milk Co. *v.* Brandenburgh, 40 N. J. L. 112; Newby *v.* Colt's Firearm Co., L. R. 7 Q. B. 293.

designates such officer or agent, service of process upon him is effectual to give the courts of such state jurisdiction over it, and a judgment supported by such service is as valid as if rendered by the courts of the state of which the corporation is a resident, upon due service of process on it there;[1] and even where a foreign corporation does business in a state without complying with its statute requiring the designation of an agent on whom service of process can be made, it will probably not be permitted to urge its non-observance of the law for the purpose of avoiding the jurisdiction of the courts of the state.[2] To entitle a judgment rendered against a corporation in a state of which it is not a resident to full faith and credit in another state, it must appear by the record either that the corporation voluntarily submitted itself to the jurisdiction of the court, or was doing business within the state; and in the latter contingency, the corporation will be permitted to attack and avoid the judgment by showing that the person on whom process was served as its officer or agent was not such, or did not occupy such relation to it as authorized process against it to be served upon him.[3]

§ 120 c. **Judgments Void because the Court Exceeded its Jurisdiction.** — It is very easy to conceive of judgments which, though entered in cases over which the court had undoubted jurisdiction, are void because they decided some question which it had no power to decide, or granted some relief which it had no power to grant, and yet it will probably not be possible to formulate any test by which to unerringly determine whether the action of the court is in similar cases void, or erroneous only. If a court grants relief which, under no circumstances, it has any authority to grant, its judgment is to that extent void;

[1] Lafayette Ins. Co. *v.* French, 18 How. 404; Ex parte Schollenberger, 96 U. S. 369; Goodwin *v.* Colorado M. & I. Co., 110 U. S. 1; St. Clair *v.* Cox, 106 U. S. 350; Capen *v.* Pacific M. I. Co., 25 N. J. L. 67; 64 Am. Dec. 412.

[2] Hagerman *v.* Empire Slate Co., 97 Pa. St. 534.

[3] St. Clair *v.* Cox, 106 U. S. 350.

as where it orders a donation out of the public treasury,[1] or enters judgment for an amount greater than it is authorized to give judgment for in any event,[2] or where, on a conviction in a criminal prosecution, the court sentences the defendant to undergo a punishment different from or in excess of that which it is authorized to impose for the offense of which he was convicted.[3] So it has been held that a judgment rendered by a justice of the peace against a prosecuting witness for costs, when there was no finding that the prosecution was instituted without probable cause or through malicious motives, is void for want of power in the justice to enter such judgment.[4] In some instances courts have undertaken to decide questions not involved in the suit or action before them, and to grant relief therein; and their judgments have been assailed for that reason, and to the extent which they departed from the matters embraced within the record they have been denied effect. Where a creditor instituted an action, alleging that he had loaned money, relying on a promise that he should be given a mortgage as security therefor upon certain land, and that the borrower had conveyed such land, in trust, for himself and his wife for life, with remainder to his children, and asked that the trust be declared void with respect to his claim, and the court, proceeding beyond the prayer of the bill, annulled the deed as between the trustee and the *cestuis que trust*, and thereby attempted to destroy the estate of the latter, it was held that this part of its decree was void.[5] In a later

[1] Bridges *v.* Clay Co. Supervisors, 57 Miss. 252.

[2] Feillett *v.* Engler, 8 Cal. 76.

[3] Ex parte Lange, 18 Wall. 163; *post*, sec. 625.

[4] Little *v.* Evans, 41 Kan. 578.

[5] Munday *v.* Vail, 43 N. J. L. 418. In this case the court said: "Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in the given case. To constitute this, there are three essentials: 1. The court must have cognizance of the class of cases to which the one to be adjudged belongs; 2. The proper parties must be present; and 3. The point decided must be, in substance and effect, within the issue. That a court cannot go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I

case in the same state, the doctrine of the case last cited was reaffirmed, and the general rule promulgated that "a judgment or decree which is not appropriate to any part of the matter in controversy before the court cannot have any force."[1] Where a widow brought suit for the sole purpose of having her dower assigned to her, and the court, after assigning it of its own accord, directed the sale of the residue of the land for division among minor heirs, the decree of sale was adjudged void.[2] A statute of the state of Missouri authorized a statutory foreclosure of mortgages and a judgment for the sale of the premises and a personal judgment against the mortgagor. A court of general jurisdiction at law and in equity, proceeding under this statute, rendered against the vendee of the mortgagor a foreclosure, and also a personal judgment. This personal judgment, in an elaborate opinion, was held to be void, on the ground that, in addition to having jurisdiction over the subject-matter and of the person, the court must be authorized to give the kind of relief which its judgment assumes to grant.[3] In most of the cases cited, the judgment or decree disposed of a subject-matter

cannot doubt that, upon general principles, such a defect must avoid a judgment. It is impossible to concede that because A and B are parties to a suit, that a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons, by becoming suitors, do not place themselves for all purposes under the control of the court, and it is only over those particular interests which they choose to draw in question that a power of judicial decision arises. If, in an ordinary foreclosure case, a man and his wife being parties, the court of chancery should decree a divorce between them, it would require no argument to convince every one that such decree, so far as it attempted to affect the matrimonial relation, was void; and yet the only infirmity in such a decree would be found, upon analysis, to arise from the circumstance that the point decided was not within the substance of the pending litigation. In such a case the court would have acted within the field of its authority, and the proper parties would have been present; the single but fatal flaw having been the absence from the record of any issue on the point determined. The invalidity of such a decree does not proceed from any mere arbitrary rule, but it rests entirely on the ground of common justice. A judgment upon a matter outside of the issue must, of necessity, be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard; and it is upon this very ground that the parties have been heard, or have had the opportunity of a hearing, that the law gives so conclusive an effect to to matters adjudicated."

[1] Reynolds *v.* Stockton, 43 N. J. Eq. 211; 3 Am. St. Rep. 305.

[2] Seamster *v.* Blackstock, 83 Va. 232; 5 Am. St. Rep. 262. See also Anthony *v.* Kasey, 83 Va. 338; 5 Am. St. Rep. 277; Wade *v.* Hancock, 76 Va. 620.

[3] Fithian *v.* Monks, 43 Mo. 502.

not included in the action or proceeding, and granted relief not germane to that there sought. A more difficult question arises when, in an action to recover a sum of money, or the possession of real or personal property, the court gives judgment for a sum in excess of that prayed for in the complaint or shown to be owing by its allegations, or for the possession of property different from or in excess of that described in the complaint. As to such excess, there has been no pleading or process seeking to recover it or notifying the defendant that it was claimed of him. Nevertheless, it has been assumed, rather than decided, that a judgment larger than the complaint justified, or for more than specified in the writ, cannot be avoided collaterally.[1]

§ 121. **Loss of Jurisdiction.** — A tribunal having undoubted jurisdiction of a cause at a certain stage may lose such jurisdiction at some subsequent stage of the proceedings. This frequently happens when a judgment has been pronounced in the appellate court upon appeal. The judgment of the superior court in this case cannot be varied in the original tribunal,[2] nor examined for any other purpose than to carry it into effect, nor reviewed for error apparent, nor intermeddled with, further than to settle so much as has been remanded.[3] Neither can the lower court do anything to prevent the immediate execution of the judgment of the appellate court.[4] So if in an action pending in a state court the proper petition is filed and proceedings taken to require its removal to the national courts, the jurisdiction of the state court is divested, and its subsequent action, should it take any, is

[1] Gillit *v.* Truax, 27 Minn. 528; Chaffee *v.* Hooper, 54 Vt. 513.

[2] McKinney *v.* Jones, 57 Wis. 301.

[3] Ex parte Sibbald *v.* U. S., 12 Pet. 488; McClanahan's Heirs *v.* Henderson's, 1 T. B. Mon. 261; McArthur *v.* Dane, 61 Ala. 539; Boynton *v.* Foster, 7 Met. 415. But of course the jurisdiction of the trial court cannot be suspended or destroyed by an attempted but invalid appeal: Brady *v.* Burke, 90 Cal. 1.

[4] Marysville *v.* Buchanan, 3 Cal. 212; McMillan *v.* Richards, 12 Cal. 468.

*coram non judice.*[1] If the statute requires regular terms to be held for the trial of causes, the court in the intervals between those terms is, for the purpose of conducting trials, in the same condition as though its authority over the case were entirely withdrawn. It is no longer a court. Judicial powers cannot be conferred upon it by consent of the parties, and any judgment rendered upon a trial had in pursuance of such consent is void,[2] and is so wanting in even the color of judicial authority that it will not be reversed upon appeal.[3] If the same district is composed

[1] Steamship Co. *v.* Tugman, 106 U. S. 118; Railroad Co. *v.* Koontz, 104 U. S. 14. *Contra*, Johnson *v.* Brewers' F. I. Co., 51 Wis. 570.

[2] State Nat. Bank *v.* Neel, 53 Ark. 110; 22 Am. St. Rep. 185; Garlick *v.* Dunn, 42 Ala. 404; Kimports *v.* Rawson, 29 W. Va. 487; Brumley *v.* State, 20 Ark. 77; Galusha *v.* Butterfield, 2 Scam. 227; Ex parte Osborn, 24 Ark. 479; Hernandez *v.* James, 23 La. Ann. 483; Dodge *v.* Coffin, 15 Kan. 277; Dixon *v.* Judge Fifth Dist., 26 La. Ann. 119; Earls *v.* Earls, 27 Kan. 538; Filley *v.* Cody, 4 Col. 109; Francis *v.* Wells, 4 Col. 274; Bruce *v.* Doolittle, 81 Ill. 103; Laughin *v.* Peckham, 66 Iowa, 121; Marshall *v.* Ravisies, 22 Fla. 583; Balm *v.* Nunn, 63 Iowa, 641; King *v.* Green, 2 Stew. 133; 19 Am. Dec. 46; Davis *v.* Fish, 1 G. Greene, 406; 48 Am. Dec. 387.

[3] Wicks *v.* Ludwig, 9 Cal. 175; Norwood *v.* Kenfield, 34 Cal. 333; Doss *v.* Waggoner, 3 Tex. 515; Leclair *v.* Globenski, 4 L. C. Rep. 139. In the absence of any statute providing to the contrary, the term is lost unless the judge appear at the appointed time and open court, and all subsequent proceedings are void: People *v.* Sanchez, 24 Cal. 17; People *v.* Bradwell, 2 Cow. 445. The presence of the judge is also indispensable to the continuation of a term properly opened. Thus in a case in Illinois, the judge, having held the term until a certain day, adjourned it till the next day. He then left, authorizing, so far as he could, the clerk and sheriff to open and adjourn court, from day to day, until another judge arrived. But when this action was called in question, the supreme court of the state held that "the judge had no power to authorize the ministerial officers of the court to exercise judicial powers, even in opening and adjourning the court," and that, as a consequence, the term expired on the first day of the judge's absence: Wight *v.* Wallbaum, 39 Ill. 554. If special terms are authorized to be held after the giving of certain notice, a trial had and judgment entered at such a term, but in the absence of the required notice, is certainly so irregular as to be set aside on appeal, and is probably void: Oram *v.* Riley, 16 Cal. 186. In the cases cited, declaring proceedings void because transacted at a time or place where the court was not authorized to transact business, the facts rendering the action *coram non judice* seem to have appeared on the record or to have been admitted by the parties. But a question of some difficulty may arise where the record does not show whether the judgment was entered in term or not. The general presumptions indulged in favor of the proceedings of courts of general jurisdiction ought, so far as they are concerned, to make a *prima facie* case in favor of those proceedings in all cases, and to shield them from all collateral attacks in those states where, as in California, jurisdictional presumptions seem to be sacred. In Tennessee the objection was made on appeal that while the court appeared to have been opened at the proper place at the first day of the term, it was nowhere shown where its subsequent sessions were held. But the objection was overruled, because it was presumed by law that the court was held where it first met, until the con-

of different counties, a trial in one of the counties on the commencement day of a term in another county, though sanctioned by the written stipulation of both parties, is *coram non judice*.[1] A judge in one district may preside in another district *in place* of the judge of the latter district.

trary was shown: Smith *v.* State, 9 Humph. 10. In regard to a case where the records of the court failed to disclose what adjournments were made after opening the term, the supreme court of North Carolina said: "The term of a court is, in legal contemplation, as one day; and although it may be open many days, all its acts refer to its commencement, with the particular exceptions in which the law may direct certain acts to be done on certain other days. It is seldom necessary that the day of any proceeding should appear in making up the record, distinct from that of the beginning of each term, although a minute may be kept of each day's doings. Nor is it necessary that there should be adjournments from day to day, after the term is once opened by the judge; nor, if there should be, that they should be recorded, in order to preserve the authority of the court to perform its functions. The court may in fact not adjourn during the whole term, but be always open; though, for the convenience of suitors, an hour of a particular day, or of the next day, may be given them for their attendance. If the record state the time of doing an act, as the statement is unnecessary, so it is harmless surplusage, unless the day be beyond the period to which the term legally extends": State *v.* Martin, 2 Ired. 122. In New York it is said that a court will be presumed to have continued open until its adjournment is shown: People *v.* Central City Bank, 53 Barb. 412. Language employed by Chief Justice Wallace of California in the matter of the application of Bennett, 44 Cal. 84, on *habeas corpus*, goes far toward asserting that a judgment entered in vacation, without either trial, argument, or submission, is valid. He said: "The principal objection made for the petitioner, as we understand it, is, that the cause here was *tried* in chambers, and not in open court; and it is said that there is no authority to try a cause except in open court. But even if this be so, we do not see that it would follow that a judgment rendered in a cause which had been tried at chambers would, for that reason, necessarily be void in the absolute sense. The district court unquestionably had jurisdiction of the subject-matter and of the parties litigant. Had the court itself rendered the judgment in question in open session at a regular term, without trial, without proof, and even without submission of the cause for decision, such judgment, however erroneous, would not be held void upon a mere collateral attack. To maintain that it would, would be to ignore the obvious distinction between a total want of authority upon the one hand, and the erroneous exercise of the conceded authority upon the other." And speaking of the power to enter judgment in vacation, the judge, in the same opinion, says: "It is a power, too, which is no more dependent upon or affected by the fact of trial had, or trial not had, than if the judgment had been entered in term time by the court. The hearing of proofs, the argument of counsel, — in other words, the trial had, — or the absence of any or all these, neither confer jurisdiction in the first instance, nor take it away after it has once fully attached."

[1] Bates *v.* Gage, 40 Cal. 183; Gregg *v.* Cooke, Peck, 82. But in Iowa, by statute, a trial commenced with a *bona fide* expectation of being finished before the close of the term may be prosecuted until its close, though it reaches into the succeeding term: State *v.* Knight, 19 Iowa, 94. In some of the states, judgment may, by consent, be signed in vacation, and ordered entered as of ensuing term: Hervey *v.* Edmunds, 68 N. C. 243; or tried in vacation and entered in term time: Roy *v.* Horsley, 6 Or. 382; 25 Am. Rep. 537. See also Morrison *v.* Citizens' Bank, 27 La. Ann. 401.

But this does not authorize two judges to hold separate courts in the same district at the same time. Therefore an order made by a judge presiding out of his district, at a time when the judge of the district where the order is made is also holding court therein, is void; and no one can be punished for contempt of court in disobeying such order.[1] In many of the states a judgment by virtue of statute authority may be entered in vacation.[2] If in a cause the court orders that "upon filing of proofs and testimony as taken by the court commissioner the case be submitted to the court and decided at chambers, and the decision and judgment be entered as of this term of the court," and the court thereafter considers such testimony after the adjournment of the term, and enters its judgment in vacation, such judgment is not void. The order amounted to a submission *in præsenti*. Such submission having been made in term time, the court was authorized to enter judgment thereon in vacation.[3] While the general statement is sometimes made that a judgment, to be valid, must be rendered at the time and place authorized by law,[4] we have not been able to discover any decision, in which the question was involved, holding that a judgment rendered by a court sitting at a place other than that designated by law is void. On the contrary, so far as the question has been judicially considered, judgments have been protected from collateral assault on that ground, and it may fairly be inferred from the decisions made that a court may, when necessary, hold its session and pronounce judgment at places other than those appointed by law.[5] In Wisconsin "the failure of a justice

[1] People *v.* O'Neil, 47 Cal. 109.

[2] Phelan *v.* Gauebin, 5 Col. 14.

[3] Ex parte Bennett, 44 Cal. 85. Statute authorizing cases to be taken under advisement does not warrant their entry in vacation: Wilson *v.* Rodewold, 61 Miss. 228; and it has been held that a judgment entered in vacation, without the judge seeing or approving it, is void, though pronounced during the term: Mitchell *v.* St. John, 98 Ind. 598. But as the duty of entering a judgment is not judicial, it may ordinarily be performed in vacation as well as in term time: Iliff *v.* Arnott, 31 Kan. 672; Sieber *v.* Frink, 7 Col. 148; Earls *v.* Earls, 27 Kan. 538; Manitowoc County *v.* Sullivan, 51 Wis. 115.

[4] State *v.* Roberts, 8 Nev. 239; Dalton *v.* Libbey, 9 Nev. 192; Cooper *v.* American Cent. Ins. Co., 3 Col. 318.

[5] Le Grange *v.* Ward, 11 Ohio, 257; Herndon *v.* Hawkins, 65 Mo. 265.

of the peace to enter in his docket the place as well as the time to which a cause pending before him is adjourned divests his jurisdiction and renders all subsequent proceedings void."[1]

When an action is finally determined by the entry of final judgment and the lapse of the term, the court, for most purposes, has exhausted its jurisdiction over it, and is in the same condition with respect to both the subject-matter and the parties as if no action had been begun. Therefore if after final judgment, or after an order setting aside a homestead or confirming a judicial sale, the court proceeds to enter another judgment, or to disturb the order setting aside the homestead or confirming the sale, its action is void, unless its jurisdiction has been continued by some motion or proceeding appropriate for that purpose.[2] It is now settled that a court may, in effect, abdicate its jurisdiction over the parties by refusing to hear them after they have been regularly brought into court, as where it orders their answer to be stricken out because they refused to take an oath of loyalty, and judgment thereafter rendered by it is void.[3] A very remarkable decision upon the question of loss of jurisdiction during the pendency of an action is one that affirms that the continued existence of plaintiff's right to recovery is essential to the continuance of the jurisdiction of the court over the subject-matter, and therefore if he, after bringing suit, accepts payment of the demand sued upon, but subsequently takes judgment therefor, it is void, because the subject-matter of the action has been extinguished by its payment.[4] But this decision is based upon a mistaken conception of the subject-matter of the action. It is not the existence of a cause of action which constitutes the subject-matter, but the allegation of such existence. The allegation may be found on judicial investigation to

[1] Witt *v.* Henge, 58 Wis. 244.
[2] State *v.* Railroad, 16 Fla. 708; Fossett *v.* McMahan, 74 Tex. 546.
[3] Henry *v.* Carson, 96 Ind. 412; Windsor *v.* McVeigh, 93 U. S. 274.
[4] Two Rivers Mfg. Co. *v.* Beyer, 74 Wis. 210; 17 Am. St. Rep. 131.

be false; but this is not equivalent to a finding that there is no subject-matter of the action, and, instead of demonstrating that the court cannot proceed further, makes it incumbent upon it to pronounce final judgment. The discharge of a cause of action by payment after the commencement of a suit can no more divest the jurisdiction of the court than the payment of the same cause of action before suit was brought could have made it impossible for the court to entertain the action and to require the defendant to appear in response to its process.

The complete exercise of jurisdiction over a subject-matter may exhaust the jurisdiction, not only of the court so exercising it, but of another court possessing concurrent jurisdiction over the same subject-matter. Thus if in the progress of the administration of an estate in the probate court of a county certain lands of a decedent are authorized to be and are sold, the sale confirmed, and a conveyance made to the purchaser, the jurisdiction of the court over such lands is clearly exhausted. They become the property of the purchaser, and cannot again be subject to administration during the continuance of his life and ownership. If the district court of the county also possesses probate jurisdiction, and subsequently assumes authority over the estate of the same decedent, and orders the same lands to be sold, and they are in fact sold to a purchaser having no knowledge of the former proceedings, such sale is void, because the former sale completely exhausted all probate jurisdiction over the lands, and the latter sale was a mere unauthorized assumption of authority over the property of a living person.[1] If a probate court appoints an executor or administrator, it cannot, while he continues in office, appoint another. Its jurisdiction is exhausted. Its further grant of letters is void.[2] Neither can it appoint another administrator after an estate has been fully administered upon and distributed

[1] Lindsay *v.* Jaffray, 55 Tex. 626; Smith *v.* Woolfolk, 115 U. S. 143.

[2] Griffith *v.* Frazier, 8 Cranch, 9; Flinn *v.* Chase, 4 Denio, 90.

to the heirs.[1] Where a statute forbade the administration upon the estates of persons who had been dead for more than twenty years, a grant of administration in defiance of the statute was adjudged void.[2] If notice is given that a petition for the sale of lands will be presented at a time specified, and it is not then presented, the persons interested in opposing it may regard it as abandoned. The court has no authority to hear it without giving a new notice.[3] But if the failure to present the application arises from the fact that the term of court is not opened, no presumption of abandonment can be indulged. The petition may, it has been held, be presented at the next term, without any new notice.[4]

§ 122. **Courts of Record and Courts not of Record.** — If in the examination of a judgment it is satisfactorily ascertained that the court whose sentence it is had jurisdiction over the subject-matter of the action, and was, at the rendition of its judgment, authorized to act as a court, the next inquiry will be, whether the court was empowered to determine the rights of the parties over whom it assumed to act. The first question to be considered is, whether the judgment was rendered by a court of general or of special jurisdiction. There is no well-defined test by which to determine in all cases whether a court belongs to the one class or to the other. But all courts invested with a general common-law jurisdiction, in law or in equity, are, when exercising such jurisdiction, properly included in the first class; while all such courts as are erected upon such principles that their judgments must be disregarded until proceedings conferring jurisdiction are shown belong to the second class.[5] These classes are frequently designated as courts of record and

[1] Fisk *v.* Norvel, 9 Tex. 13; 58 Am. Dec. 128.

[2] Wales *v.* Willard, 2 Mass. 120.

[3] Turney *v.* Turney, 24 Ill. 625; Gibson *v.* Roll, 30 Ill. 172; 83 Am. Dec. 181; Morris *v.* Hogle, 37 Ill. 150; 87 Am. Dec. 243. See also *post*, sec. 526.

[4] Hanks *v.* Neal, 44 Miss. 224.

[5] Harvey *v.* Tyler, 2 Wall. 328; Kempe's Lessee *v.* Kennedy, 5 Cranch, 185.

courts not of record. Courts of record having authority over the subject-matter are competent to decide upon their own jurisdiction, and to exercise it to final judgment, without setting forth upon their records the facts and evidence upon which their decision is based. Their records are absolute verities, not to be impugned by averment or proof to the contrary.[1] A court may possess powers of a limited and subordinate character, and yet not be a court of special or limited jurisdiction in the sense that it ought to certify everything precisely.[2]

"The use of the words 'superior' and 'inferior,' or 'limited' and 'general,' however apt they may have once been, are less so at this time and place, and their duties, in view of our system and mode of procedure, would be better performed by the terms 'courts of record' and 'courts and tribunals not of record.'"[3] "A court of record is that where the acts and judicial proceedings are enrolled on parchment for a perpetual memorial and testimony, which rolls are called the records of the court, and are of such high and supereminent authority that their truth is not to be called in question."[4] The circuit, district,[5] and territorial courts of the United States are courts of record, and so are the orphans' courts in Pennsylvania and Alabama,[6] and the probate courts in Arkansas, Minnesota,[7] Missouri,[8] California,[9] Ohio,[10] Vermont,[11] and South Carolina.[12] Prior to 1858 the probate court in California was

[1] Grignon's Lessee *v.* Astor, 2 How. 319; Rex *v.* Carlile, 2 Barn. & Adol. 367; Molins *v.* Werly, 1 Lev. 76; Cole *v.* Green, 1 Lev. 309; Bowsse *v.* Cannington, Cro. Jac. 244.

[2] Peacock *v.* Bill, 1 Saund. 74.

[3] Hahn *v.* Kelly, 34 Cal. 391; 94 Am. Dec. 742.

[4] 3 Steph. Com. 583; 3 Bla. Com. 24.

[5] Page *v.* United States, 11 Wall. 268; Reed *v.* Vaughan, 15 Mo. 137; 55 Am. Dec. 133.

[6] Musselman's Appeal, 65 Pa. St. 485; Lex's Appeal, 97 Pa. St. 289; Veach *v.* Rice, 131 U. S. 293.

[7] Dayton *v.* Mintzer, 22 Minn. 393; Osborne *v.* Graham, 30 Ark. 67; Apel *v.* Kelsey, 52 Ark. 341; 20 Am. St. Rep. 183.

[8] Johnson *v.* Beazley, 65 Mo. 250; 27 Am. Rep. 276; Camden *v.* Plain, 91 Mo. 117; Rowden *v.* Brown, 9. Mo. 429.

[9] Luco *v.* Commercial Bank, 70 Cal. 339; McCauley *v.* Harvey, 49 Cal. 497. In this state the jurisdiction formerly exercised by the probate court is now vested in the superior court. The alcalde's court, which existed in this state while it belonged to Mexico, was one of general jurisdiction: Braly *v.* Reese, 51 Cal. 447.

[10] Shroyer *v.* Richmond, 16 Ohio St. 455.

[11] Doolittle *v.* Holton, 28 Vt. 819; 67 Am. Dec. 745.

[12] Turner *v.* Malone, 24 S. C. 398; Angell *v.* Angell, 14 R. I. 541.

a court of limited jurisdiction, and its proceedings were required to show the facts conferring upon the court its authority to act.[1] The judgments of justices of the peace are favored with the same presumptions as though they were pronounced in courts of record, in the states of Pennsylvania,[2] Connecticut,[3] Vermont,[4] Tennessee,[5] Mississippi,[6] and Texas.[7]

§ 123. **Special Powers.** — The jurisdiction exercised by courts of record is, in many cases, dependent upon special statutes conferring an authority in derogation of the common law, and specifying the manner in which such authority shall be employed. The decided preponderance of adjudged cases upon the subject establishes the rule that judgments arising from the exercise of this jurisdiction are to be regarded in no other light, and supported by no other presumptions, than judgments pronounced in courts not of record. The particular state of facts necessary to confer jurisdiction will not be presumed; and if such facts do not appear, the judgment will be treated as void.[8] The supreme court of the United States has laid down the rule that when a statute prescribes the manner in which the rights conferred by it are to be pursued, and the powers delegated by it are to be exercised in a special and summary manner, the proceedings

[1] Grimes *v.* Norris, 6 Cal. 621; 65 Am. Dec. 545; Haynes *v.* Meeks, 10 Cal. 110; 70 Am. Dec. 703.

[2] Billings *v.* Russell, 23 Pa. St. 189; 62 Am. Dec. 330; Clark *v.* McCommau, 7 Watts & S. 469.

[3] Fox *v.* Hoyt, 12 Conn. 491; 31 Am. Dec. 760.

[4] Wright *v.* Hazen, 24 Vt. 143.

[5] Turner *v.* Ireland, 11 Humph. 447.

[6] Stevens *v.* Mangum, 27 Miss. 481.

[7] Heck v. Martin, 75 Tex. 469; 16 Am. St. Rep. 915; Holmes *v.* Buckner, 67 Tex. 107; Williams *v.* Ball, 52 Tex. 603; 36 Am. Rep. 730.

[8] Shivers *v.* Wilson, 5 Har. & J. 130; 19 Am. Dec. 497; Foster *v.* Glazener, 27 Ala. 391, 663; Thatcher *v.* Powell, 6 Wheat. 119; Striker *v.* Kelly, 7 Hill, 24; Denning *v.* Corwin, 11 Wend. 647; Ludlow *v.* Johnson, 3 Ohio, 553; 17 Am. Dec. 609; Mitchell *v.* Runkle, 25 Tex. Supp. 132; Adams *v.* Jeffries, 12 Ohio, 253; 40 Am. Dec. 477; Cone *v.* Cotton, 2 Blackf. 82; Earthman *v.* Jones, 2 Yerg. 493; Barry *v.* Patterson, 3 Humph. 313; Wight *v.* Warner, 1 Doug. (Mich.) 384; Gunn *v.* Howell, 27 Ala. 663; 62 Am. Dec. 785; Chicago & N. W. R. R. Co. *v.* Galt, 23 N. E. Rep. 425 (Ill.); Brown *v.* Wheelock, 75 Tex. 385; Graham *v.* Reynolds, 45 Ala. 578; Embury *v.* Conner, 3 N. Y. 511; 53 Am. Dec. 325; Cooper *v.* Sunderland, 3 Iowa, 114; 66 Am. Dec. 52; Goodwin *v.* Sims, 86 Ala. 102; 11 Am. St. Rep. 21.

of the court will be considered as of the same character as the proceedings of courts not of record; but when the statute confers new powers and rights, to be brought into action by the usual form of common-law or of chancery practice, the proceedings and judgments of the court will have all the characteristics of the proceedings and judgments of courts of record.[1]

The doctrine that the judgments of courts of record are of any less force, or are to be subjected to any closer scrutiny, or that they are attended with any less liberal presumptions, when created by virtue of a special or statutory authority, than when rendered in the exercise of ordinary jurisdiction, has been repudiated in some of the states;[2] and the reasons sustaining this repudiation have been stated with such clearness and force as to produce the conviction that the doctrine repudiated has no foundation in principle, however strongly it may be sustained by precedent. In the first place, it is shown that the discrimination between courts of record and courts

[1] Harvey *v.* Tyler, 2 Wall. 342. If the facts necessary to confer jurisdiction are shown to exist, a judgment cannot be collaterally attacked, though rendered by a court in the exercise of a special statutory authority: Secombe *v.* R. R. Co., 23 Wall. 108; McCahill *v.* Equitable Life Ins. Co., 26 N. J. Eq. 531. The question whether and when the judgments of courts of general jurisdiction may be treated as of no greater dignity than those of courts of special and limited jurisdiction was very elaborately considered by the supreme court of the United States in Galpin *v.* Page, 18 Wall. 350. From a full review of the recent decisions, the court of appeals of Virginia determined that there might be extracted therefrom "the following general legal propositions of universal application:—

"1. When a court of general jurisdiction acts within the scope of its general powers, its judgments will be presumed to be in accordance with its jurisdiction, and cannot be collaterally impeached.

"2. So, also, when a court of general jurisdiction has conferred upon it special powers by special statute, and such special powers are exercised *judicially*, that is, according to the course of the common law and proceedings in chancery, such judgment cannot be impeached collaterally.

"3. But where a court of general jurisdiction has conferred upon it special and summary powers, wholly derived from statutes, and which do not belong to it as a court of general jurisdiction, and when such powers are not exercised according to the course of the common law, its action being ministerial only, and not judicial, in such case its decision must be regarded and treated like those of courts of limited and special jurisdiction, and no such presumption of jurisdiction will attend the judgment of the court. But in such cases the facts essential to the exercise of the special jurisdiction must appear on the face of the record": Pulaski Co. *v.* Stuart, 28 Gratt. 879.

[2] Falkner *v.* Guild, 10 Wis. 572; Hahn *v.* Kelly, 34 Cal. 391; 94 Am. Dec. 742; Newcomb's Ex'rs *v.* Newcomb, 13 Bush, 544; 26 Am. Rep. 222.

not of record "is founded upon considerations of the wisest policy, which are obvious to all. Courts of record are presided over by men of experience and learned in the law, assisted by counsel also of experience and learning, who, in the discharge of their duties to their clients, necessarily act as advisers of the court. Their proceedings are conducted with solemnity and deliberation, and in strict conformity with established modes, with which long experience has made the court and bar familiar, and above all, they are taken down and made a matter of record at or about the time they transpire. Of inferior courts, as a general rule, none of these things can be affirmed." In the second place, it is shown that none of those reasons upon which the discrimination between different courts rests tends to justify any discrimination between different proceedings conducted by the same court; that whether a court proceeds according to the "course of the common law," or according to some authority conferred and some course prescribed by a statute, it is, in either case, presided over by the same judge, assisted by the same counsel and officers, and conducted with the same wisdom, caution, and solemnity. In either case its proceedings are equally matters of record, and equally subject to fixed and well-understood laws. And finally, it is suggested that, as no reason has been given for regarding the same tribunal with different degrees of consideration, according to circumstances which seem not to affect its claims to our confidence, therefore all its adjudications, though arising out of the exercise of lawful jurisdiction conferred at different times, or from different but equally competent sources, should be subjected to similar rules and indulged with equal presumptions.[1]

§ 124. **Presumption in Favor of Jurisdiction.**—If it is ascertained that the judgment or decree under examination was rendered by a court of record in the exercise of

[1] See opinion of Sanderson, J., in Hahn *v.* Kelly, 34 Cal. 391; 94 Am. Dec. 742.

its ordinary jurisdiction over the subject-matter in litigation, the next fact to be determined is, whether the court had jurisdiction over the person against whom the judgment has been obtained. The preponderance of authorities shows that in a collateral proceeding this fact must be determined by an inspection of the matters contained in what, at the time of entering the judgment, constituted the record or judgment roll. Any other paper which happens to be on file in the case, and improperly attached to the record, must be disregarded. The record, however, may be silent upon the subject of jurisdiction. It may fail to show whether the proceedings taken to bring the defendant within the authority of the court were sufficient or insufficient; or, for aught that appears by the judgment roll, no attempt may have been made to perform some act essential to jurisdiction. "Nothing shall be intended to be out of the jurisdiction of a superior court but that which expressly appears to be so."[1] Hence, though the existence of any jurisdictional fact may not be affirmed upon the record, it will be presumed upon a collateral attack that the court, if of general jurisdiction, acted correctly and with due authority, and its judgment will be as valid as though every fact necessary to jurisdiction affirmatively appeared. The decisions to this effect are very numerous.[2] If a statute required a certain affidavit

[1] Gosset *v.* Howard, 10 Q. B. 453; Guilford *v.* Love, 49 Tex. 715; Goar *v.* Maranda, 57 Ind. 339.

[2] Withers *v.* Patterson, 27 Tex. 491; 86 Am. Dec. 643; Holmes *v.* Campbell, 12 Minn. 221; Spaulding *v.* Baldwin, 31 Ind. 376; Evans *v.* Ashby, 22 Ind. 15; Butcher *v.* Bank of Brownsville, 2 Kan. 70; 83 Am. Dec. 446; Reynolds *v.* Stansbury, 20 Ohio, 344; 55 Am. Dec. 459; Bush *v.* Lindsey, 24 Ga. 245; 71 Am. Dec. 117; Hahn *v.* Kelly, 34 Cal. 391; 94 Am. Dec. 742; Calkins *v.* Packer, 21 Barb. 275; Prince *v.* Griffin, 16 Iowa, 552; Grignon's Lessee *v.* Astor, 2 How. 319; Cox *v.* Thomas, 9 Gratt. 323; Wells *v.* Waterhouse, 22 Me. 131; Ely *v.* Tallman, 14 Wis. 28; Potter *v.* Mechanics' Bank, 28 N. Y. 656; Kelsey *v.* Wyley, 10 Ga. 371; Skillman *v.* Greenwood, 15 Minn. 102; Arnold *v.* Nye, 23 Mich. 286; Smith *v.* Pomeroy, 2 Dill. 414; Adams *v.* Jeffries, 12 Ohio, 253; 40 Am. Dec. 477; Palmer *v.* Oakley, 2 Doug. (Mich.) 433; 47 Am. Dec. 41; Hering *v.* Chambers, 103 Pa. St. 172; Coit *v.* Haven, 30 Conn. 190; 79 Am. Dec. 244; Weaver *v.* Brown, 87 Ala. 533; Woodhouse *v.* Filbatis, 77 Va. 317; Stahl *v.* Mitchell, 41 Minn. 325; Horan *v.* Wahrenberger, 9 Tex. 313; 58 Am. Dec. 439; McCormick *v.* Webster, 89 Ind. 105; Reinig *v.* Hecht, 58 Wis. 212; Cummisky *v.* Cummisky, 109 Pa. St. 1; Tunell *v.* Warren, 25 Minn. 9; Exchange Bank *v.* Ault, 102 Ind. 322; Wilkins *v.* Tourtellott, 42 Kan. 176; Kenney *v.* Greer, 13 Ill. 432; 54 Am. Dec. 439.

to be filed or a certain fact to be found prior to the rendition of judgment, it will be presumed, in the absence of any statement or showing upon the subject, that such affidavit was filed[1] or such fact found.[2] One acting in a court of record as attorney *in fact* for a party will be presumed to have satisfied the court of his authority to act, and the proceedings cannot be collaterally attacked because the proof of such authority does not appear in the record.[3]

A case decided at an early day in New York seemed to be in opposition to the current of authorities on the subject of the presumptions which attend the proceedings of courts of record when called in question collaterally.[4] The opinion in this case, so far as it placed proceedings of "superior" courts upon the same footing with those of "inferior" courts, was soon after overruled.[5] A few other cases are reported which do not seem to be entirely consistent with the rule upon this subject.[6] But it was reserved to the court deciding the case of *Steen* v. *Steen*, 25 Miss. 513, to exhibit an extraordinary misconception of the law, by the use of the following language: "It is also a fixed rule on this subject that the record of the judgment must show upon its face that the court did have jurisdiction of the person. Unless it so appears, the judgment is a nullity, for it will not be presumed that the court had jurisdiction unless the record shows that fact." The courts of the states of Kansas and Missouri seem to be following close in the wake of those of the state of Mississippi. In a case in the first-named state, the plaintiff's title depended upon a certain judgment, sale, and sheriff's deed. In attempting to prove his title,

[1] Dean *v.* Thatcher, 32 N. J. L. 470; Newcomb's Executor *v.* Newcomb, 13 Bush, 544; 26 Am. Rep. 222.

[2] Thornton *v.* Baker, 15 R. I. 553; 2 Am. St. Rep. 925.

[3] Pillsbury *v.* Dugan, 9 Ohio, 117; 34 Am. Dec. 427.

[4] Denning *v.* Corwin, 11 Wend. 648.

[5] Foot *v.* Stevens, 17 Wend. 483.

[6] Gwin *v.* McCarroll, 1 Smedes & M. 351; Cline *v.* Gibson, 23 Ind. 11; Glidewell *v.* Spaugh, 26 Ind. 319. But the recent Indiana decisions indulge presumptions in support of the judgments of courts of record in extreme cases: O'Brien *v.* State, 125 Ind. 38; Anderson *v.* Wilson, 100 Ind. 402.

he showed first that the files of the case were all burned, and next produced a journal entry of the judgment. This entry contained the statement that the defendant had been duly served by publication in a newspaper which it specified. Upon these facts the court determined that "until it appears, not merely that the papers are gone, but also that there is no secondary proof of their contents, there is no presumption, even in favor of a court of general jurisdiction, from the existence of one part of a record, that the remainder would, if produced, contain the facts necessary to give the court jurisdiction."[1] In a very recent decision in the state of Missouri, we find the general rule announced that "if the whole record, taken together, does not show that the court had jurisdiction over the defendant, then the judgment would be a nullity."[2]

§ 125. **No Presumption against the Record.** — Presumptions in favor of proceedings of courts of record are indulged only in relation to those jurisdictional matters concerning which the judgment roll is silent. But no presumptions in support of the judgment are to be allowed in opposition to any statement contained in the record. If an act is stated in the roll to have been done in a specified manner, no presumption arises that, at some future time, the act was done in a better or more efficient manner. If it appears that the process was served in a particular mode, no other and different service can be presumed. To indulge such a presumption would be to contradict the record, which imports absolute verity. When, therefore, the record shows that certain steps were taken to procure jurisdiction, and the law does not consider those steps sufficient, the judgment will be regarded as void, for want of jurisdiction over the defendant.[3] And where the record shows that the court was not in

[1] Hargis *v.* Morse, 7 Kan. 417.
[2] Howard *v.* Thornton, 50 Mo. 291.
[3] Barber *v.* Morris, 37 Minn. 194; 5 Am. St. Rep. 836; Godfrey *v.* Valentine, 39 Minn. 336; 12 Am. St. Rep. 657; Clark *v.* Thompson, 47 Ill. 25; 95 Am. Dec. 457; Hahn *v.* Kelly, 34 Cal. 391; 94 Am. Dec. 742.

session on a particular day, a proceeding cannot be supported, at least in Missouri, by parol evidence that the court was in fact in session and transacting business on the day designated, "but that by mistake in writing up the records they failed to show the fact."[1]

§ 126. **Defects in Process or the Service thereof.** — There is a difference between a want of jurisdiction and a defect in obtaining jurisdiction. At common law the defendant was brought within the power of the court by service of the *brevia*, or original writ. In this country the same object is accomplished by service of summons, either actual or constructive, or of some other process issued in the suit; or by the voluntary appearance of the defendant in person or by his attorney. From the moment of the service of process, the court has such control over the litigants that all its subsequent proceedings, however erroneous, are not void. If there is any irregularity in the process, or in the manner of its service, the defendant must take advantage of such irregularity by some motion or proceeding in the court where the action is pending. The fact that defendant is not given all the time allowed him by law to plead,[2] or that he was served by some person incompetent to make a valid service, or any other fact connected with the service of process, on account of which a judgment by default would be reversed upon appeal, will not ordinarily make the judgment vulnerable to a collateral attack.[3] In case of an attempted

[1] Ange *v.* Corby, 70 Mo. 257.

[2] Ballinger *v.* Tarbell, 16 Iowa, 491; 85 Am. Dec. 527; McAlpin *v.* Sweetser, 76 Ind. 78; Estate of Newman, 75 Cal. 213; 7 Am. St. Rep. 146. *Contra*, Johnson *v.* Baker, 38 Ill. 98; 87 Am. Dec. 293.

[3] Whitwell *v.* Barbier, 7 Cal. 54; Dorente *v.* Sullivan, 7 Cal. 279; Smith *v.* Bradley, 6 Smedes & M. 485; Mooney *v.* Maas, 22 Iowa, 380; 92 Am. Dec. 395; Peck *v.* Strauss, 33 Cal. 678; Myers *v.* Overton, 2 Abb. Pr. 344; Hunter *v.* Lester, 18 How. Pr. 347; Haughey *v.* Wilson, 1 Hilt. 259; Kipp *v.* Fullerton, 4 Minn. 473; Cole *v.* Butler, 43 Me. 401; Hendrick *v.* Whittemore, 105 Mass. 23; Drake *v.* Duvenick, 45 Cal. 455; Lane *v.* Innes, 43 Minn. 136; Schobacher *v.* Germantown F. M. Co., 59 Wis. 86; Hume *v.* Conduitt, 76 Ind. 598; McCormick *v.* Webster, 89 Ind. 105; Dutton *v.* Hobson, 7 Kan. 196; Myers *v.* Davis, 47 Iowa, 325; Sims *v.* Gray, 5 Rep. 504; Town of Lyons *v.* Cooledge, 89 Ill. 529; De Tar *v.* Boone Co., 34 Iowa, 488; Pope *v.* Hooper, 5 Rep. 72; Sac. Savings Bank *v.* Spencer, 53 Cal. 737.

"A distinction is to be made between

service of process, the presumption exists that the court considered and determined the question whether the acts done were sufficient or insufficient. If so, the conclusion reached by the court, being derived from hearing and deliberating upon a matter which, by law, it was authorized to hear and decide, though erroneous, cannot be void. When in a proceeding by attachment the ground required by the statute for the issuing and execution of the process has been laid, and the process has been issued and executed, the jurisdiction of the court is complete. If the subsequent proceedings do not conform to law, the judgment may be reversed. When there has been an insufficient publication, or an entire failure to publish, the proceedings are not so invalidated as to be made void.[1] A service of process defective in giving four days' notice, when the law required five days' notice, is nevertheless sufficient to support the judgment of a justice of the peace.[2] In proceedings *in personam*, a judgment is undoubtedly void if it is shown that the party against whom it was rendered did not appear in the action and that process was not served upon him;[3] but it is not indispensable to the jurisdiction of the court that either the process or its

a case where there is *no* service whatever, and one which is simply *defective* or *irregular*. In the first case, the court acquires no jurisdiction, and its judgment is void; in the other case, if the court to which the process is returnable adjudges the service to be sufficient, and renders judgment thereon, such judgment is not void, but only subject to be set aside by the court which gave it, upon seasonable and proper application, or reversed upon appeal": Isaacs *v.* Price, 2 Dill. 351. A judgment is not void because rendered *before* or after the return day named in the summons. It is only liable to be vacated for irregularity: Glover *v.* Holman, 3 Heisk. 519; West *v.* Williamson, 1 Swan, 277. The rule that defective service of process does not render the judgment liable to successful collateral attack has been frequently enforced in Mississippi, a state in which the courts have, in other respects, been loath to accord any favors to records suffering from symptoms of jurisdictional infirmity: Christian *v.* O'Neal, 46 Miss. 669; Harrington *v.* Wofford, 46 Miss. 31; Campbell *v.* Hays, 41 Miss. 561.

[1] Martin *v.* Hall, 70 Ala. 421; Paine's Lessee *v.* Moreland, 15 Ohio, 435; Beech *v.* Abbott, 6 Vt. 586; Matter of Clark, 3 Denio, 167; Williams *v.* Stewart, 3 Wis. 773; Drake on Attachments, secs. 447, 448.

[2] Ballinger *v.* Tarbell, 16 Iowa, 492; 85 Am. Dec. 527.

[3] Freeman *v.* Alderson, 119 U. S. 188; Elliot *v.* McCormack, 144 Mass. 11; St. Clair *v.* Cox, 106 U. S. 353; Flint R. S. Co. *v.* Roberts, 2 Fla. 102; 48 Am. Dec. 178; Capehart *v.* Cunningham, 12 W. Va. 750; Anderson *v.* Hawhe, 115 Ill. 33; Horner *v.* State Bank, 1 Ind. 130; 48 Am. Dec. 355.

service should be in all respects regular. We therefore proceed to consider what defects, either in the process or its service, are sufficient and what insufficient to overthrow the judgment. In many of the states, their statutes declare what the summons or other process designed to bring defendant into court shall contain, and sometimes these statutory provisions have been deemed mandatory, and judgments declared void for non-compliance therewith. Thus in Colorado, a summons was adjudged to be fatally defective, and the judgment based thereon void, because of the omission to state in such summons, as required by statute, "the cause and general nature of an action," and because it notified defendant that judgment would be taken against him for a sum designated, when it should have informed that the plaintiff would "apply to the court for the relief demanded in the complaint";[1] but even in this state it is conceded that a literal compliance with the statute is not necessary, and the omission of some of the words which it directs the summons to contain not fatal to the judgment.[2] The objects to be accomplished by process are to advise the defendant that an action or proceeding has been commenced against him by plaintiff, and warn him that he must appear within a time and at a place named and make such defense as he has, and in default of his so doing, that judgment against him will be applied for or taken in a sum designated, or for relief specified. If the summons actually issued accomplishes these purposes, it should be held sufficient to confer jurisdiction, though it may be irregular in not containing other statements required by the statute. If, on the other hand, it is wanting in these essential particulars, it will generally fail to give the court jurisdiction.[3] In Iowa, a judgment was held void because the name of the plaintiff, as shown by the summons, was Pike, when in fact, and according to the complaint, it was Rike;[4] and in Idaho a

[1] Atchison, Topeka etc. R. R. Co. *v.* Nicholls, 8 Col. 188.
[2] Kimball *v.* Castagnio, 8 Col. 525.
[3] Pickering *v.* State, 106 Ind. 228.
[4] Newman *v.* Bowers, 72 Iowa, 465.

like conclusion was announced because defendants were named in the alternative, as A, B, C, or D.[1] The general rule is, that if process is amendable it is not void, and will support a judgment,[2] unless it is not sufficient to warn defendant of an action against him, and when and before what court he must make his defense.[3] Therefore a judgment will, when collaterally attacked, be supported by process though it contains a statement that "plaintiff will take judgment for a sum named," when the statute requires it to state that "the plaintiff will apply to the court for the relief demanded in the complaint";[4] or directs defendants "to appear on the first Monday, 1877, of the next term of the court to be holden at Carthage," when the court referred to held terms at the place designated, the time of commencement of which was fixed by law;[5] or declared that the plaintiff would apply to the court for the relief demanded in the complaint, when it should have stated that plaintiff will take judgment for a sum specified in the summons;[6] or because the summons was not attested by the seal of the court,[7] or did not show where the defendants should appear.[8] In an action to foreclose a lien, if the summons refers to the petition on file, the fact that it does not state that a money judgment is sought is not fatal to such judgment if rendered.[9]

So far as a personal service of summons is concerned, it seems to us that it should be deemed sufficient to support a judgment when collaterally attacked that the summons was delivered to the defendant under such circumstances as to advise him that it was intended as a service of process upon him. A judgment was, however, declared void in Kentucky because the action was in the name of a sheriff, though he had no pecuniary interest

[1] Alexander *v.* Leland, 1 Idaho, N. S., 425.
[2] Baker *v.* Thompson, 75 Ga. 164.
[3] Kitsmiller *v.* Kitchen, 24 Iowa, 163.
[4] Keybers *v.* McComber, 67 Cal. 395.
[5] Jasper Co. *v.* Wadlow, 82 Mo. 172.
[6] Miller *v.* Zeigler, 3 Utah, 17.
[7] Boyd *v.* Fitch, 71 Ind. 306.
[8] Hollingsworth *v.* State, 111 Ind. 289.
[9] Blair *v.* Wolf, 72 Iowa, 246; York *v.* Boardman, 40 Iowa, 57.

therein, and the service of process was made by him.[1] That a copy of the summons given to the defendant was incorrect, and designated the amount which the plaintiff sought to recover as less than that named in the original writ cannot render a judgment by default based thereon void.[2] A defect in the form of a return made by an officer serving a summons is not sufficient to avoid the judgment, especially if it appears from other evidence that the service was properly made.[3] A service of process before an action is commenced,[4] or upon a person other than the defendant,[5] or upon an employee of a corporation,[6] when the law requires it to be upon its general agent, or the acceptance of its service by one not authorized to do so,[7] is not in law any service at all, and a judgment thereon is void.

Because a court has no jurisdiction to compel the appearance of a non-resident personally, but may by service of its process constructively or beyond the state acquire jurisdiction over his property which is attached in the action, sufficient to authorize it to render a judgment to be enforced out of such property, the service of the summons and the levy of the attachment are both essential to the support of the judgment,[8] unless the statute authorizes a proceeding so clearly *in rem* that judgment may be pronounced upon seizing the property, and without attempting to serve the summons. It is further essential that the cause of action on which the attachment issued should be sustained. Plaintiff cannot, by taking out an attachment and levying it upon the property of a non-resident, and the constructive service of process on him, entitle himself to a judgment enforceable out of such property, if the cause of action on which he recovers is

[1] Knott *v.* Jarboe, 1 Met. (Ky.) 505.
[2] Bassett *v.* Mitchell, 40 Kan. 549; Hale *v.* McComas, 59 Tex. 484.
[3] Schee *v.* Granger, 78 Iowa, 101.
[4] South Bend P. Co. *v.* Manahan, 62 Mich. 143.
[5] Heffner *v.* Gunz, 29 Minn. 108.
[6] Great West etc. Co. *v.* Woodmas etc. Co., 12 Col. 46; 13 Am. St. Rep. 204.
[7] Finney *v.* Clark, 84 Va. 354.
[8] Segar *v.* Muskegon etc. Co., 81 Mich. 344; Stuart *v.* Anderson, 70 Tex. 588.

not the one upon which he procured the attachment, nor one upon which any writ of attachment was authorized to be issued.[1] And, generally, it appears proper to limit the effect of process to the claims and causes of action of which it gives notice; and where a complaint is filed, an attachment levied, and process issued and constructively served, all founded upon and referring to a particular cause of action, the plaintiff has no right to thereafter amend his complaint by setting forth a different cause of action, and then to take judgment based upon the levy of attachment and the service of process, founded on the original complaint; and such judgment, if so taken, is probably void.[2]

§ 127. **Constructive Service of Process.** — Under the fourteenth amendment to the constitution of the United States, declaring that no state shall "deprive any person of life, liberty, or property without due process of law," it is manifest that a state cannot authorize a judgment against a defendant without giving him some opportunity to show that it is unjust; that what is due process of law is a question for the determination of the national courts; and that such determination as they have made, or shall hereafter make, respecting it must be followed by the state courts.[3] As yet we have no very precise judicial definition of due process of law, and must therefore apply such general definitions as have been given. "It is sufficient," said the supreme court of the United States, "to observe here that by due process is meant one which, following the forms of law, is appropriate to the case and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an

[1] Mudge *v.* Steinhart, 78 Cal. 34; 12 Am. St. Rep. 17.

[2] Stuart *v.* Anderson, 70 Tex. 588; McRee *v.* Brown, 45 Tex. 507; Morrison *v.* Walker, 22 Tex. 20.

[3] Belcher *v.* Chambers, 53 Cal. 635; Pennoyer *v.* Neff, 95 U. S. 714; Stuart *v.* Palmer, 74 N. Y. 183; 30 Am. Rep. 289; Davidson *v.* New Orleans, 96 U. S. 97.

opportunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty, or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights."[1] It is, perhaps, not essential that the service of process and the opportunity to be heard occur before the formal entry of judgment, if the parties affected thereby, notwithstanding its entry, retain the right to resist and prevent its enforcement whenever it is sought to be used against them or their property.[2]

The service of process need not be personal. To require it to be personal in all instances would be to deny justice in all cases where the party from whom it was due absented or concealed himself, or otherwise eluded the agents of the law. Each state may, doubtless, provide the mode in which the process of its courts may be served,[3] provided the parties against whom it issues are not deprived of "an opportunity to be heard respecting the justice of the judgment sought." Therefore citizens and residents of a state may, if its laws so provide, be served with process by the publication thereof, or by leaving it at their usual place of abode, or in such other mode as the legislature deems proper under the circumstances of the case, if it appears probable that it will advise them of the proceedings against them and afford them an opportunity to defend.[4] It is true that on such service no per-

[1] Hagar *v.* Reclamation Dist., 111 U. S. 708; Hurtado *v.* California, 110 U. S. 516.

[2] Flint River Steamboat Co. *v.* Foster, 5 Ga. 194; 48 Am. Dec. 248; Hagar *v.* Reclamation Dist., 111 U. S. 701.

[3] Welch *v.* Sykes, 3 Gilm. 197; 44 Am. Dec. 689.

[4] Thouvenin *v.* Rodrigues, 24 Tex. 468; Hurlburt *v.* Thomas, 55 Conn. 181; 3 Am. St. Rep. 43; Happy *v.* Mosher, 48 N. Y. 313; Rockwell *v.* Nearing, 35 N. Y. 202; Beard *v.* Beard, 21 Ind. 321; Orcutt *v.* Ranney, 10 Cush. 183; Henderson *v.* Stanford, 105 Mass. 104; Morrison *v.* Underwood, 5 Cush. 52; *post*, sec. 120 a; Otis *v.* Dargan, 53 Ala. 178; Burman *v.* Commonwealth, 1 Duer, 210. In the only case in which, so far as we are aware, the question has directly presented itself for decision, it was decided that, as to residents upon whom process could be personally served, it was beyond the power of the legislature to authorize service by publication. The action was to foreclose a mortgage, and in determining it, the court said

sonal judgment can be rendered against one not a citizen or a resident of the state; but this result does not follow

(Bardwell *v.* Collins, 44 Minn. 97; 20 Am. St. Rep. 547): "The only remaining question, therefore, is, whether it is competent for the legislature to authorize such service in such actions upon residents of the state personally present, and capable of being found and personally served, within its jurisdiction. Is such service 'due process of law'? In determining this question, it becomes important, first, to consider the character of an action to foreclose a mortgage. It is not an action *in rem*, but an action *in personam*. It is true, it has for its object certain specific real property against which it is sought to enforce the lien of the mortgage; and in that sense it partakes somewhat of the nature of a proceeding *in rem*, but not differently, or in any other sense, than do actions in ejectment, replevin, for specific performance of a contract to convey, to determine adverse claim to real estate, and the like. The rights and equities of all parties interested in the mortgaged premises are to be adjusted in the action, which proceeds, not against the property, but against the persons; and the judgment binds only those who are parties to the suit, and those in privity with them: Whalley *v.* Eldridge, 24 Minn. 358. Next, it is not only an action *in personam*, but is also strictly judicial in its character, proceeding according to the due course of common law, like any other ordinary action cognizable in courts of equity or common law. These facts are important for the reason that what would be due process of law in one kind of proceeding might not be such in another, for reasons that will be alluded to hereafter. No court has ever attempted to give a complete or exhaustive definition of the term 'due process of law,' for it is incapable of any such definition. All that can be done is to lay down certain general principles, and apply these to the facts of each case as they arise. Mr. Webster, in his argument in the Dartmouth College case, gave an exposition of the words 'law of the land,' and 'due process of law,' which has often been quoted by the courts with approval, viz.: 'The general law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial.' In judicial proceedings, 'due process of law' requires notice, hearing, and judgment. It does not mean, of course, the general body of the law, common and statute, as it was at the time the constitution took effect; for that would deny to the legislature the power to change or amend the law in any particular. Neither, on the other hand, does 'the law of the land' or 'due process of law' mean anything which the legislature may see fit to declare to be such; for there are certain fundamental rights which our system of jurisprudence has always recognized which not even the legislature can disregard in proceedings by which a person is deprived of life, liberty, or property; and one of these is, notice before judgment in all judicial proceedings. Although the legislature may at its pleasure provide new remedies or change old ones, the power is nevertheless subject to the condition that it cannot remove certain ancient landmarks, or take away certain fundamental rights which have been always recognized and observed in judicial procedures. Hence it becomes important, in determining what kind of notice would constitute 'due process of law' in any judicial proceeding affecting a man's property, to ascertain what notice has always been required and deemed essentially necessary in actions or proceedings of that kind, according to that system of jurisprudence of which ours is derivative. In proceedings *in rem*, as in admiralty, and the like, where the process of the court goes against the thing, which is in the custody of the court, and is technically the defendant, and persons are not made parties to the suits, but come in rather as interveners, it is not essential to the jurisdiction that the persons having an interest in the thing to be affected by the judgment should have personal notice of the proceeding, or in fact any other notice than such as is implied in the seizure of the thing itself. There are other proceedings in the nature of proceedings *in rem*, many of them not strictly judicial, and none of them proceedings according to the

from the mode of serving process, but from the fact that he is not personally within the jurisdiction of the state,

course of common law, — such as the probate of wills, administration on the estates of deceased persons, the exercise of the right of eminent domain, the exercise of the power of taxation, — which affect property rights, but in which personal notice to persons interested in the subject or object of the proceedings has never been deemed necessary. Some form of substituted service of notice, as by publication, has always, from considerations of public policy or necessity, been deemed appropriate to such proceedings, and hence, as to them, 'due process of law.' But we think that, from the earliest period of English jurisprudence down to the present, as well as in the jurisprudence of the United States, derived from that of England, it has always been considered a cardinal and fundamental principle that, in actions *in personam* proceeding according to the course of common law, personal service (or its equivalent, as by leaving a copy at his usual place of abode) of the writ, process, or summons must be made on all defendants resident and to be found within the jurisdiction of the court. We do not mean that the term 'proceeding according to the course of the common law,' as used in the books, is to be understood as meaning, necessarily and always, personal or actual service of process; for although service by publication is of modern origin, there has always been some mode by which jurisdiction has been obtained at common law by something amounting to or equivalent to constructive service, where the defendant could not be found and served personally. But what we do mean to assert is, that the right to resort to such constructive or substituted service, in personal actions proceeding according to the course of the common law, rests upon the necessities of the case, and has always been limited and restricted to cases where personal service could not be made because the defendant was a non-resident, or had absconded, or had concealed himself for the purpose of avoiding service. As showing what means were resorted to as amounting or equivalent to constructive service, and how strictly it was limited to cases of necessity by both courts of common law and courts of chancery, reference need only be had to 3 Blackstone's Commentaries, 283, 444. As a substitute for the means formerly resorted to in England in such cases, most of the American states have adopted service of the process or summons by publication. But we have found no statute, except the one now under consideration, which has assumed to authorize such a mode of service, and have found no case where its validity has been sustained by the courts, except as to defendants who could not be found within the jurisdiction, either because of non-residence, or because they had absconded, or concealed themselves to avoid the service of process. We think this will be found true in every instance, from the earliest decisions on the subject down to the latest utterance of the supreme court of the United States, in Arndt *v.* Griggs, 134 U. S. 316, in which that court took occasion to set at rest some misapprehensions as to the scope of their previous decision in Hart *v.* Sansom, 110 U. S. 151. We think it would be a surprise to the bench and the bar of the country if it should be held that process or summons in ordinary civil actions might be served on resident defendants, present and capable of being found within the jurisdiction of the court, merely by publication in a newspaper. The dangers and abuses that would arise from such a practice are too apparent to require to be named or even suggested. So radical a departure is this from the uniform and well-established ideas of what constitutes due process of law in such cases that, although this act has been on the statute-books for twenty-four years, we doubt whether one lawyer in twenty is aware of its existence; and we have yet to hear of any case, except the present, where any one has ventured to act upon it. It is, in our judgment, beyond the power of the legislature to disregard so fundamental and long-established a principle of our jurisprudence. Service by publication, under such circumstances, is not 'due process of law,' and therefore any

and cannot by any means be required to appear in its courts.

In many of the decisions upon the subject, statutes authorizing the service of process by publication against non-residents have been construed as in opposition to the course of proceedings at common law; and a strict compliance with all the material directions of the statutes has been required to appear upon the face of the record, in order to impart validity to the judgment.[1] A publication made in the absence of any law authorizing it is the same in effect as no publication. A judgment based upon it is void.[2] The same result follows when the publication was made without any affidavit or order of court to support it,[3] or when, though there is an order of court, there is nothing upon which to base it, as where such order could only be made upon a verified complaint, and the complaint is not verified.[4]

"The general presumption indulged in support of the judgments and decrees of the superior courts is, however, limited to jurisdiction over persons within their territorial limits, — persons who can be reached by their process, — and also over proceedings which are in accordance with the course of the common law. Whenever it appears, either from inspection of the record or by evidence outside of the record, that the defendants were, at the time of the alleged service upon them, beyond the reach of the process of the court, the presumption ceases, and the burden of establishing the jurisdiction over them is thrown upon

statute assuming to authorize it is unconstitutional. It would be of little use to cite authorities upon a subject which has been so much and so often discussed in its many phases, as each case must be determined upon its own facts, and hence the decided cases would ordinarily be in point only by way of analogy. See, however, Brown *v.* Board of Levee Comm'rs, 50 Miss. 468."

[1] Hallett *v.* Righters, 13 How. Pr. 43; Boyland *v.* Boyland, 18 Ill. 552; Brownfield *v.* Dyer, 7 Bush, 505; Zacharie *v.* Bowers, 1 Smedes & M. 584; 40 Am. Dec. 111; O'Rear *v.* Lazarus, 8 Col. 608; Hebel *v.* Amazon Ins. Co., 33 Mich. 400; Bryan *v.* McDowell, 15 Lea, 581.

[2] Hollingsworth *v.* Barbour, 4 Pet. 466; Shields *v.* Miller, 9 Kan. 390.

[3] People *v.* Mullan, 65 Cal. 396; Murphy *v.* Lyons, 19 Neb. 689; People *v.* Greene, 74 Cal. 400; 5 Am. St. Rep. 448; Chase *v.* Kaynor, 78 Iowa, 449; Hyde *v.* Redding, 74 Cal. 493.

[4] Frisk *v.* Reigelman, 75 Wis. 499; 17 Am. St. Rep. 98.

the party who invokes the benefit or protection of its judgments and decrees. So, too, the presumption ceases when the proceedings are not in accordance with the course of common law."[1] Constructive service by publication in a case where the defendants are beyond the territorial limits of the court by virtue of an order made and enforced by the military authorities in time of war, and are not allowed to return, is a mere idle ceremony. It can by no possibility afford to defendants an opportunity of making a complete defense or of appearing in court and attending to their interests. A judgment based upon it is void.[2] But a party who voluntarily entered the confederate lines to engage in hostilities against the United States, and who, on that account, was not able to return, cannot urge a condition of facts resulting from his own wrong as a valid objection to proceedings against him as an absentee.[3] But in quite a number of cases, the same presumptions have been applied to judgments based upon constructive service as to those based upon actual service. The position is taken that presumptions of regularity are applicable to the proceedings of courts of record, not because of the particular means which those tribunals happen to employ, under the authority of the law, for the purpose of acquiring jurisdiction over the defendant, but because of the high character of the courts themselves; and that this character is essentially the same in all cases, irrespective of the methods employed in the service of process. Therefore the fact that the affidavit required by law to precede and authorize the order for publication does not appear from the record will not make the judg-

[1] Judge Field in Gray *v.* Larrimore, 2 Abb. 542; and in Galpin *v.* Page, 18 Wall. 350; 3 Saw. 93; Neff *v.* Pennoyer, 3 Saw. 274; Beleher *v.* Chambers, 53 Cal. 635; 9 Rep. 40. We know not how to reconcile the language of the court, in Galpin *v.* Page, quoted above, with its more recent utterances in Applegate *v.* L. & C. Co. Min. Co., 117 U. S. 255, shown in the latter part of this section.

[2] Dean *v.* Nelson, 10 Wall. 158; Lassere *v.* Rocherean, 17 Wall. 437; Earle *v.* McVeigh, 91 U. S. 503; Dorr *v.* Rohr, 82 Va. 359; 3 Am. St. Rep. 106.

[3] Ludlow *v.* Ramsey, 11 Wall. 581; Foreman *v.* Carter, 9 Kan. 681.

ment vulnerable to collateral attack.[1] Constructive service, though not employed in the manner now generally authorized by statute, was nevertheless well known to the common law and to the chancery practice at an early period.[2] It is therefore "a proceeding according to the course of common law."[3]

The tendency of recent decisions is to strengthen the position that the orders and proceedings of courts of general jurisdiction, where process is constructively served, are supported by the same presumptions as where the court proceeds upon personal service, and can no more be avoided for mere errors or irregularities than can its other orders and judgments.[4] The authorities upon this side of the question have apparently received an unexpected accession from the supreme court of the United States. From the language employed by that tribunal in the case of *Galpin* v. *Page*, already quoted in this section, we understood it to be firmly committed to the doctrine that when it appeared that the defendants were served with process by publication, no jurisdictional presumptions could be indulged in favor of the judgment, but its language is now limited in its application to cases in which it does not appear that the court made any order justifying such publication. On the other hand, if it is shown that the court ordered such service, its judgments are supported by the same presumptions as in other cases, unless the statute requires that evidence of some jurisdictional fact shall appear by record and it does not so appear. The question upon which doubt yet remains is as to what the court understands to be a requirement that a

[1] Nash *v.* Church, 10 Wis. 312; Lawler's Heirs *v.* White, 27 Tex. 250; Gemmell *v.* Rice, 13 Minn. 400; Newcomb's Ex'rs *v.* Newcomb, 13 Bush, 544; 26 Am. Rep. 222.

[2] 3 Bla. Com. 283, 444.

[3] Hahn *v.* Kelly, 34 Cal. 417; 94 Am. Dec. 742.

[4] Fanning *v.* Krapfl, 68 Iowa, 244; Dowell *v.* Lahr, 97 Ind. 146; Everhart *v.* Holloway, 55 Iowa, 179; Quarl *v.* Abbett, 102 Ind. 233; 52 Am. Rep. 662; Williams *v.* Morehead, 33 Kan. 609; Spillman *v.* Williams, 91 N. C. 483; Williams *v.* Hudson, 93 Mo. 524; Oswald *v.* Kempmann, 28 Fed. Rep. 36; Stuart *v.* Anderson, 70 Tex. 588; Adams *v.* Cowles, 95 Mo. 501; 6 Am. St. Rep. 74.

jurisdictional fact shall appear by the record. If it means that when the statute declares that an affidavit or other writing shall be filed to procure an order of publication, and that some written evidence shall be presented to the court of the publication as ordered, that these affidavits or other writings are, whether made so by statute or not, indispensable parts of the record, so that when they are not found in the record, the existence of jurisdiction is disproved, little has been gained by the decision referred to. If, on the other hand, it means that, except as to matters which the statute has expressly required to be a part of the record or judgment roll, the court must always presume that jurisdiction was obtained, where the record does not rebut such presumption, then this decision is an important aid to the ultimate establishment of the rule that judgments of courts, based upon constructive service of process, are supported by the same presumptions as if such service were personal.[1] There

[1] Appelgate *v.* Lexington and Carter County Min. Co., 117 U. S. 255. In this case the statute under which the proceeding resulting in the judgment in question had been conducted authorized the court to appoint a day for the absent defendants to enter their appearance in the suit, and required that a copy of its order should be published "in the Kentucky Gazette or Herald, and continued for two months successively, and shall also be published on some Sunday, immediately after divine service, in such church or meeting-house as the court shall direct, and another copy shall be posted at the front door of said court-house." In support of the judgment, extrinsic evidence was offered of the publication of the order in the Kentucky Gazette, in nine successive weekly issues of that paper, commencing December 12, 1798, and ending February 7, 1799; but there was no evidence of the publication of the order in church or its posting at the door of the court-house. Proceeding to determine the case, after stating these facts, the court said: "But the record contained no proof of the publication and posting of the notice as required by the statute, and it is insisted by the defendants in this case that the record itself must show the publication and posting of the notice as required by law, otherwise the jurisdiction of the court does not appear, and its decree is absolutely void. While it must be conceded that, in order to give the court jurisdiction over the persons of the defendants, all the steps pointed out by the statute to effect constructive service on non-residents were necessary, yet it does not follow that the evidence that the steps were taken must appear in the record, unless, indeed, the statute expressly or by implication requires it. The court which made the decree in the case of Clark *v.* Conkling was a court of general jurisdiction. Therefore every presumption not inconsistent with the record is to be indulged in, in favor of its jurisdiction: Kempe's Lessee *v.* Kennedy, 5 Cranch, 173; Voorhees *v.* Bank of the United States, 10 Pet. 449; Grignon *v.* Astor, 2 How. 319; Harvey *v.* Tyler, 2 Wall. 328. It is to be presumed that the court, before making its decree, took care to see that its order for constructive service, on which its right to make the decree depended, had

are decisions indicating that when a statute requires the filing of an affidavit to precede an order for the publica-

been obeyed. That this presumption is authorized will appear by the following cases: In Harvey *v.* Tyler, 2 Wall. 328, the court, speaking by Mr. Justice Miller, said: 'The jurisdiction which is now exercised by the common-law courts in this country is, in a very large proportion, dependent upon special statutes conferring it. . . . . In all cases where the new powers thus conferred are to be brought into action in the usual form of common-law or chancery proceedings, we apprehend there can be little doubt that the same presumptions as to the jurisdiction of the court and the conclusiveness of its action will be made as in cases falling more strictly within the usual powers of the court': Page 342. In Hall *v.* Law, 102 U. S. 461, the validity of a partition of lands made by a circuit court of the state of Indiana was attacked. This court, speaking by Mr. Justice Field, said: 'All that the statute designates as necessary to authorize the court to act is, that there should be an application for the partition by one or more joint proprietors, after giving notice of the intended application in a public newspaper for at least four weeks. When application is made, the court must consider whether it is by a proper party, whether it is sufficient in form and substance, and whether the requisite notice has been given, as prescribed. Its order made thereon is an adjudication on these matters': Pages 463, 464. The case of Voorhees *v.* Bank of the United States, 10 Pet. 449, was an action of ejectment, and the case turned on the validity of a sale of the premises in controversy under a judgment of the court of common pleas of Hamilton County, Ohio, in a case of foreign attachment. The sale was attacked on the following among other grounds: 1. Because the statute authorizing the proceeding by foreign attachment required that an affidavit should be made and filed with the clerk before the writ issued, and no such affidavit was found in the record; 2. Because the statute directed three months' notice to be given, by publication in a newspaper, of the issuing of the attachment, before judgment should be entered, and also required fifteen days' notice of the sale to be given, neither of which appeared by the record to have been done; 3. Because the statute required that the defendant should be put in default at each of the three terms preceding the judgment, and the default entered of record, but no entry was made of the default at the last of the three terms. But the court overruled the objections, and sustained the validity of the judgment and the sale. It said: 'But the provisions of the law do not prescribe what shall be deemed evidence that such acts have been done, or direct that their performance shall appear on the record. The thirteenth section (of the attachment law), which gives to the conveyances of the auditors the same effect as a deed from the defendant in the attachment, contains no other limitation than that it shall be "in virtue of the authority herein granted." This leaves the question open to the application of those general principles of law by which the validity of sales made under judicial process must be tested, in the ascertainment of which we do not think it necessary to examine the record in the attachment for evidence that the acts alleged to have been omitted appear therein to have been done': Page 471. The result of the authorities, and what we decide, is, that where a court of general jurisdiction is authorized in a proceeding, either statutory, or at law, or in equity, to bring in by publication or other substituted service non-resident defendants interested in or having a lien upon property lying within its territorial jurisdiction, but is not required to place the proof of service upon the record, and the court orders such substituted service, it will be presumed in favor of the jurisdiction that service was made as ordered, although no evidence thereof appears of record, and the judgment of the court, so far as it affects such property, will be valid. The case of Galpin *v.* Page, 18 Wall. 350, cited by counsel for defendant, is not in conflict with this proposition. The judgment set up on one side and attacked on the other, in that case, was rendered on service by

tion of process, that though it was made in due time, and filed on the day the judgment was entered, yet that the failure to so file it at the time required by the statute renders the judgment void.[1] Where the affidavit or other proof of the steps constituting the constructive service of process cannot be found in the judgment roll, or in the files of the court, or being found is defective, such proof may be amended or supplied, and the judgment thereby supported.[2]

§ 128. **Appearance by Attorney.** — By the ancient practice, the litigants appeared in person, and were not authorized to appear by attorney without special authority from the crown. At a later day, the right to appear by attorney was recognized by various statutes. Under these, the attorney was at first appointed orally in court. Subsequently, he was required to have his authority to act reduced to writing and filed in the court. The rules have been gradually relaxed, until now it is presumed, in all collateral proceedings, that an attorney who has appeared for a litigant, without service of process, had authority to act for the person whom he assumed to represent.[3] The only question is, whether, in collateral proceedings, this presumption is conclusive, or not. There are many authorities holding it to be indisputable,[4] and it is difficult

publication. The law permitted service to be made by publication only where certain facts were made to appear to the satisfaction of the court, and the court by a precedent order, which must necessarily appear of record, authorized service to be made by publication. But the record showed no such order, and the publication, therefore, was the unauthorized act of the party, and appeared affirmatively to be invalid and ineffectual."

[1] Barber *v.* Morris, 37 Minn. 194; 5 Am. St. Rep. 836.

[2] Allison *v.* Thomas, 72 Cal. 562; 1 Am. St. Rep. 829; Shenandoah V. R. R. Co. *v.* Ashby's Trustees, 86 Va. 232; 19 Am. St. Rep. 891; Newman's Estate, 75 Cal. 213; 7 Am. St. Rep. 146; Fisk *v.* Reigelman, 75 Wis. 499; 17 Am. St. Rep. 198; Burr *v.* Seymour, 43 Minn. 401; 19 Am. St. Rep. 245. These cases are, however, irreconcilable with expressions to be found in the opinion of the court in Reinhart *v.* Lugo, 86 Cal. 395; 21 Am. St. Rep. 52.

[3] Harshey *v.* Blackmarr, 20 Iowa, 161; 89 Am. Dec. 520; Arnold *v.* Nye, 23 Mich. 286; Martin *v.* Judd, 60 Ill. 78; Bunton *v.* Lyford, 37 N. H. 512; 75 Am. Dec. 144.

[4] Field *v.* Gibbs, 1 Pet. C. C. 155; Baker *v.* Stonebraker's Adm'r, 34 Mo. 175; Reed *v.* Pratt, 2 Hill, 64; Hoffmire *v.* Hoffmire, 3 Edw. Ch. 174; Am. Ins. Co. *v.* Oakley, 9 Paige, 496; 38 Am. Dec. 561; Carpentier *v.* Oakland, 30 Cal. 439; Hamilton *v.* Wright, 37 N. Y. 502; Brown *v.* Nichols, 42 N. Y.

to determine whether they are in the majority, or not; but we think that with respect to cases in which process has not been served in any mode, and jurisdiction rests entirely upon the appearance of an attorney on behalf of defendant, the rule which permits him to collaterally avoid the judgment, by proving that such appearance was without his authority or knowledge, is gaining adherents and destined to obtain the ascendency.[1] But even where the authority of the attorney to appear is, after judgment, an open question, and the judgment is liable to be treated as a nullity upon showing that the attorney acted without authority, the judgment may be validated by a subsequent recognition of the attorney's acts, such, for instance, as paying him for his services in the action in which the judgment was entered.[2] Where a warrant of attorney has been given to confess judgment, and the plaintiff engages an attorney to act under such warrant, the case is very different from that of an ordinary appearance. If the warrant is insufficient, the defendant is not bound by the judgment.[3]

§ 129. **Default.**—The record may show that the judgment was entered by the clerk, upon the default of the defendant. The clerk has no judicial functions. The statute directs the judgment. The clerk acts as the agent of the statute in writing out and filing its judgment among the records of the court. If the law did not authorize its agent to act, the judgment is without any

26; Wandling *v.* Straw, 25 W. Va. 692; St. Albans *v.* Bush, 4 Vt. 58; 23 Am. Dec. 246; Newcomb *v.* Peck, 17 Vt. 302; 44 Am. Dec. 340; Abbott *v.* Dutton, 44 Vt. 546; 8 Am. Rep. 394; Everett *v.* Warner Bank, 58 N. H. 340.

[1] Barker *v.* Spencer, 61 Tex. 155; Kepley *v.* Irwin, 14 Neb. 300; Hess *v.* Cole, 23 N. J. L. 125; Reynolds *v.* Fleming, 30 Kan. 106; 46 Am. Rep. 86; Bodurtha *v.* Goodrich, 3 Gray, 508; Shumway *v.* Stillman, 6 Wend. 453; 15 Am. Dec. 374; Great West etc. Co. *v.* Woodmas etc. Co., 12 Col. 46; 13 Am. St. Rep. 204; Shelton *v.* Tiffin, 6 How. 163; Green *v.* Green, 42 Kan. 654; 16 Am. St. Rep. 510; Reber *v.* Wright, 68 Pa. St. 471; Brinkman *v.* Shaffer, 23 Kan. 528. In New York, though an appearance by an attorney cannot be questioned collaterally, the defendant is permitted to show that the alleged appearance was a forgery: Ferguson *v.* Crawford, 70 N. Y. 253; 26 Am. Rep. 589.

[2] Ryan *v.* Doyle, 31 Iowa, 53.

[3] Merchants' etc. Bank *v.* Boyd, 3 Denio, 257; Merchants' etc. Bank *v.* St. John, 5 Hill, 497.

authority, and is therefore void. Thus where several defendants were sued upon a joint liability, and a portion summoned to answer the complaint, the clerk, not being so authorized by law, entered judgment by default against those who were summoned, and in default the judgment was declared to be void.[1] Judgment for costs entered by the clerk in the absence of a cost bill is also void.[2] A judgment by default, entered within the time prescribed for the defendant to appear in a justice's court, is void in Missouri.[3] The service of notice of a motion to dissolve an attachment on account of irregularity, made by the defendant's attorney, is not such an appearance as will support a judgment by default.[4] If, however, in a case where the authority of a clerk to enter judgment is undoubted, he errs in the performance of his duty, as by making the entry for too large a sum, his action is not void, but only erroneous.[5]

§ 130. **Findings of Jurisdiction.** — It may happen, when that part of the record containing the evidence of service shows an insufficient service, that other parts of the record, and especially the judgment, disclose the fact that the matter of jurisdiction has been considered and determined by the court. The conclusion or finding upon this subject may appear by recitals stating that defendant has been cited to appear, or that he has entered his appearance, or that his default for not appearing has been duly entered. These findings are as conclusive upon the parties, in all collateral proceedings, as any adjudication of the court can be. It must be presumed that they were supported by sufficient testimony, not set forth in the record. Thus though the return upon a summons against A B certifies a service of such summons upon C D, and the judgment states that A B has been sum-

[1] Kelly *v.* Van Austin, 17 Cal. 564; Junkans *v.* Bergin, 64 Cal. 203.
[2] Chapin *v.* Broder, 16 Cal. 403.
[3] Howard *v.* Clark, 43 Mo. 344; France *v.* Evans, 90 Mo. 74; Williams *v.* Bower, 26 Mo. 601.
[4] Glidden *v.* Packard, 28 Cal. 649.
[5] Bond *v.* Pacheco, 30 Cal. 530.

moned, the record is not necessarily contradictory. The error in the service of process may have been corrected by service of the summons on the proper person. And since the statement to this effect is made by the court, it will be conclusively presumed that it acted upon ample evidence and with due deliberation before making such statement; and the judgment will be impregnable to any collateral assault.[1] A finding or recital showing that the court had jurisdiction is, in the vast majority of the states, not disputable when a judgment based thereon is drawn in question collaterally.[2] The same rules and presumptions attach to proceedings in a court of general jurisdiction in California to enforce the payment of taxes as to proceedings in any other class of actions. A recital in the decree "that all owners and claimants of the property above described have been duly summoned to answer the complaint herein, and have made default in that behalf," is sufficient to bind all claimants of the property in suit. The fact that the summons as served by publication omitted the name of one of the defendants, to whom the property was assessed, is not fatal to the decree; because from the above recital it must be presumed that the court had sufficient proof of the service of such defendant, though it does not appear in the judgment roll.[3] In some of the cases already cited in this section, the effect of jurisdictional findings was carried to its utmost limit, and further, perhaps, than is justified by the more recent adjudications. The recital in the judgment of the due ser-

[1] Hahn *v.* Kelly, 34 Cal. 391; 94 Am. Dec. 742; Quivey *v.* Baker, 37 Cal. 465; McCauley *v.* Fulton, 4 Pac. L. Rep. 170; 44 Cal. 355; Dunham *v.* Wilfong, 69 Mo. 355; Blaisdell *v.* Pray, 68 Me. 269.

[2] Weir *v.* Monahan, 67 Miss. 434; Hartman *v.* Ogborn, 54 Pa. St. 120; 93 Am. Dec. 679; Hall *v.* Lowther, 22 W. Va. 570; Dufour *v.* Camfranc, 11 Mart. 607; 13 Am. Dec. 360; Goodwin *v.* Sims, 86 Ala. 102; 11 Am. St. Rep. 21; Moffitt *v.* Moffitt, 69 Ill. 641; Brickhouse *v.* Sutton, 99 N. C. 103; 6 Am. St. Rep. 497; Farmers' Ins. Co. *v.* Highsmith, 44 Iowa, 330; Rhodes *v.* Gunn, 35 Ohio St. 387; Harris *v.* McClanahan, 11 Lea, 181; Wilcher *v.* Robertson, 78 Va. 602; Dunham *v.* Wilfong, 69 Mo. 355; Heck *v.* Martin, 75 Tex. 669; 16 Am. St. Rep. 915; Schee *v.* La Grange, 78 Iowa, 101; Treadway *v.* Eastburn, 57 Tex. 209; Edwards *v.* Moore, 99 N. C. 1; Davis *v.* Robinson, 70 Tex. 394; Ex parte Ah Men, 77 Cal. 198; 11 Am. St. Rep. 263.

[3] Reily *v.* Lancaster, 39 Cal. 354; Branson *v.* Caruthers, 49 Cal. 375.

vice of process ought unquestionably to prevail over any inference to be drawn from the fact that the other parts of the record fail to show when or in what manner the process was served.[1] Generally, the recital of jurisdiction or of service of process contained in the judgment will be construed in connection with the whole record, and will be deemed to refer to the kind of service shown by the other parts of the record. Hence if one part of the record shows that process was served constructively, as by the publication thereof, a personal service will not be presumed, because in the judgment the court adjudges "that service of notice has been made upon said defendant,"[2] especially where an affidavit is found among the papers on file showing that the residence of the defendant was unknown, and could not be ascertained. In Kansas, "a finding of notice is at best but *prima facie* evidence of notice. If an attempt at notice appears in the record, the finding, if a general one, refers to and is limited by such attempted notice. If that be fatally defective, there is no presumption of notice in any other or better way."[3] In Illinois, the general recital or finding of notice or of service of process is, as we understand the decisions in that state, conclusive as against any evidence not contained in the record,[4] but is disregarded when from the whole record it appears to be untrue, or when the record discloses the evidence upon which the recital was based, and further, that such evidence overthrows rather than supports the recital.[5]

The recitals or findings of jurisdiction may affirm, in general terms, the service, or due service, of process, without indicating that the attention of the court has been specially called to the kind of service made, or that it has

[1] Rumfelt *v.* O'Brien, 57 Mo. 569; Bannon *v.* People, 1 Ill. App. 496.

[2] Mayfield *v.* Bennett, 48 Iowa, 194.

[3] Mickel *v.* Hicks, 19 Kan. 578; 27 Am. Rep. 161.

[4] Andrews *v.* Bernhardi, 87 Ill. 365; Mulvey *v.* Gibbons, 87 Ill. 367; Barnett *v.* Wolf, 70 Ill. 76; Harris *v.* Lester, 80 Ill. 307.

[5] Barnett *v.* Wolf, 70 Ill. 76; Senichka *v.* Lowe, 74 Ill. 274; Turner *v.* Jenkins, 79 Ill. 228; Bannon *v.* People, 1 Ill. App. 496.

probably based its finding upon other evidence than that disclosed by the record. In such cases it is not reasonable that the general statement should prevail over the evidence contained in the record. It should rather be construed as referring to and founded upon it; and if the service shown by it is not such as will support the judgment, it should be treated as void, notwithstanding the general statement in the judgment that process has been duly served.[1]

§ 131. **Jurisdictional Inquiries Confined to the Record.**—We have hitherto assumed that the question of the jurisdiction of a court of record over the parties to any domestic judgment must, in all collateral proceedings, be determined by the record; and that the answer to this question is not, except in some direct proceeding instituted against the judgment, to be sought from any extraneous proof. This doctrine seems to be the natural and unavoidable result of that stamp of authenticity which, from the earliest times, was placed upon the "record," and which gave it such "uncontrollable credit and verity that no plea, proof, or averment could be heard to the contrary." Proceeding undoubtedly from the reliance which, in the primitive stages of practice, was placed on the official memorials of the proceedings of courts, and supported by the rule that the best evidence ought always to be heard, to the exclusion of all inferior evidence, this doctrine has received the indorsement of the courts of last resort in more than a majority of the states of this Union. The principles on which it rests are clearly and ably stated by Gholson, J., in *Callen* v. *Ellison*, 13 Ohio St. 446, 82 Am. Dec. 448, in the following language: "When process is instituted,—when on a demand for it in the prescribed mode the process of the court is issued,—the steps taken under that process must be matter proper for

[1] Settlemier *v.* Sullivan, 97 U. S. 444; Cheely *v.* Clayton, 110 U. S. 708; Cloud *v.* Pierce City, 86 Mo. 357; Coan *v.* Clow, 83 Ind. 417; Hobby *v.* Bunch, 83 Ga. 1; 20 Am. St. Rep. 301; Adams *v.* Cowles, 95 Mo. 501; 6 Am. St. Rep. 74.

the consideration of the court. The court must determine whether the suit is prosecuted; whether the demand for the thing to which a right is asserted is continued. So if it be claimed that process has been waived, the fact of waiver, or the authority to waive, as shown by the evidence, must be decided by the court. This determination or decision may be express on the very point, as by an assertion on the record that the process has been served, or that the party has appeared by an attorney, or it may be necessarily implied in the action of the court upon the demand of the party. The determination or decision that a party has been served with process, or that he has given authority to waive process, if in truth he has not been served or given such authority, is a determination or decision, when he has had no opportunity to be heard. Hence the right to show, in opposition to the record of such determination or decision, the truth by evidence has been claimed, as required by the principles of natural justice. If the court act at all upon the question whether a party has been served with process, or has authorized an appearance in the absence of such party, then the decision must be made at the risk of an incorrect conclusion. And it would be absurd to require notice of such inquiry, as that would involve a similar inquiry whether there was notice of that notice. The court must act upon the demand for which process has been instituted, either with or without inquiry into the fact whether such process had been served. That there should be no inquiry that a judgment by default should be rendered without inquiry into the fact whether the process has been served on the defendant, cannot, with any propriety, be claimed. If, then, the inquiry should be made, what effect is to be given to the determination or decision? Is it obligatory, unless impeached or set aside in the mode prescribed as to other decisions of the court? or may it be disregarded as null and void whenever brought in question upon allegation and proof that the party in truth had no notice

or opportunity to be heard? Here arises a conflict between principles of policy, which require the former conclusion, and principles of natural justice, which lead to the latter; and as might be expected in cases of such conflict, the decisions of courts have differed. As to the judgments of courts of general jurisdiction, the decisions in this state, though perhaps not entirely uniform or consistent, do undoubtedly show a strong inclination to sustain such judgments against indirect or collateral attacks on their validity and effect. It appears to have been thought that natural justice is satisfied when notice is required, and an impartial tribunal established to ascertain and determine whether it has been given. Nor can it properly be said that such a tribunal has jurisdiction because it has so decided. Its decision is binding because it was authorized to make it, and because public policy, and the respect due to the sovereignty it represents, at least in tribunals acting under the same sovereignty, require that the decision should be regarded, while it remains on the record unimpeached and unreversed. In the case of *Lessee of Fowler* v. *Whiteman*, 2 Ohio St. 270, it is said to have 'become established by a series of decisions in Ohio that the finding of a court of general jurisdiction, upon a subject-matter properly before it, cannot be impeached.' The finding in that, and in the previous cases there referred to, was upon the question of notice." In this case from which this quotation is made the records stated that "defendants, by George Collins, Esq., their attorney, came into court, and by virtue of his power of attorney filed in this court confessed judgment for the defendants," etc. It was claimed that the power of attorney found among the records did not appear to be executed by some of the defendants, and that other of the defendants were married women, incapable of executing such power. But the court held that this power, though found among the papers in the case, was no part of *the record;* that the object of filing the power was not to

furnish means to render the judgment void, "but to furnish the parties affected by the judgment ready means to apply to the court itself to correct any irregularity or error"; and that no such application having been made, the judgment must be regarded as valid.

The rule that evidence will not be heard in a collateral proceeding, for the purpose of avoiding a judgment, is thus defended in the case of *Coit* v. *Haven*, 30 Conn. 199; 79 Am. Dec. 244: "But the counsel for the defendants urge the extreme hardship to which a party may be subjected, if he may not deny and disprove the service of the writ, when he can clearly show that in fact no service was ever made on him, and that he never had notice of the suit in any form, and never heard of the judgment against him until it was made the ground of an action. They say, with great emphasis, — and the argument is certainly a forcible one, — Can it be that a clerk of a court may fabricate a record, or an officer make a false return of service, and yet there be no escape for one who is thus by a judgment in the suit made heavily indebted, or found guilty of a wrong, when in fact he is perfectly innocent, or never owed the debt, and could show it clearly if he had a chance? Will a court, they ask, because it has a general jurisdiction, protect and give effect to such a fraud? It will not be denied, and has not been on the argument, that when a court has jurisdiction its record speaks absolute verity, because it is the record of the court's doings; and being a court of final jurisdiction, there must be an end to the matter in dispute, if it be possible to reach that end at all. And it is so necessary that confidence should be reposed in courts of a high character, as well as in the records of such courts, that on the whole, and in view of all the considerations affecting the subject, it is the only safe rule to give the decisions of courts of general jurisdiction full effect so long as they remain in force, rather than to leave them open to be attacked in every way and on all occasions. Being domestic judg-

ments, they can, if erroneous, be reviewed by proceedings instituted directly for the purpose, and reversed on error, or by a new trial; and if the danger is imminent and special, relief can be temporarily, if not finally, obtained by application to a court of equity. Any other rule with regard to judgments of such courts would be attended in its application with very great embarrassment, and would be very dangerous in its general operation. The general good clearly requires, and has therefore established the rule, that domestic judgments of courts of general jurisdiction cannot be attacked collaterally."

If the record of a domestic court of general jurisdiction declare notice to have been given, such declaration cannot be contradicted by plea or proof, because, for reasons of public policy, the records of such courts are presumed to speak the truth, and can be tried only by inspection.[1] "It is not to be denied that a court of superior jurisdiction may so make a record in a case where in fact it has no jurisdiction that the validity of the judgment cannot be questioned collaterally."[2] The fact of jurisdiction appearing on the record, it cannot be controverted. Any other matter determined by the court might as well be disputed as this.[3]

§ 132. **Silence of the Record.** — A large proportion of the decisions denying the right to collaterally impeach a judgment or decree for want of jurisdiction over the party against whom the determination has been made have

[1] Selin *v.* Snyder, 7 Serg. & R. 166; Farr *v.* Ladd, 37 Vt. 156; Eastman *v.* Waterman, 26 Vt. 494; Lyles *v.* Robinson, 1 Bail. 25; Aultman *v.* McLean, 27 Iowa, 129; Penobscot R. R. Co. *v.* Weeks, 52 Me. 456; Hotchkiss *v.* Cutting, 14 Minn. 537; Morgan *v.* Burnett, 18 Ohio, 535; Segee *v.* Thomas, 3 Blatchf. 11; Harman *v.* Moore, 112 Ind. 221.

[2] Dequindre *v.* Williams, 31 Ind. 444.

[3] Pugh *v.* McCue, 86 Va. 475; Starnes *v.* Hadnot, 42 La. Ann. 366; People *v.* Harrison, 84 Cal. 607; Rigby *v.* Lefevre, 58 Miss. 639; Swift *v.* Meyers, 37 Fed. Rep. 37; Westerwelt *v.* Lewis, 2 McLean, 511; Riley *v.* Waugh, 8 Cush. 220; Borden *v.* State, 11 Ark. 519; Delaney *v.* Gault, 30 Pa. St. 63; Galpin *v.* Page, 1 Saw. 318; Miller *v.* Ewing, 8 Smedes & M. 421; Wright *v.* Weisinger, 5 Smedes & M. 210; Riggs *v.* Collins, 2 Biss. 268; Peyroux *v.* Peyroux, 24 La. Ann. 175; McCreery *v.* Fortson, 35 Tex. 641. Probably this rule does not prevail in New York: Ferguson *v.* Crawford, 70 N. Y. 253; 26 Am. Rep. 589.

been pronounced where the service of process appeared distinctly or by necessary implication upon the record. The authorities, however, all concede that the mere fact that the record is silent respecting the existence of some jurisdictional fact cannot create the presumption that such fact did not exist. On the contrary, its existence will be presumed.[1] The only question is, whether the presumption may be overcome by extrinsic evidence. The preponderance of the decisions upon this question supports the doctrine that "it is a matter of no consequence whether the jurisdiction of the court affirmatively appears upon the judgment roll or not; for if it does not, it will be conclusively presumed."[2] In a recent case it is said: "We concur fully in the doctrine of the numerous cases cited for plaintiff, where it is held that a domestic judgment of a court of record of general jurisdiction, proceeding according to the course of the common law, cannot be impeached by the parties to it, where a want of jurisdiction is not apparent upon the record, while it remains neither annulled nor reversed."[3] It is a familiar principle that the judgment or decree of a court of general jurisdiction cannot be collaterally questioned, except for want of authority over the matter adjudicated upon.[4] Fraud in procuring a judgment cannot be shown by the parties to

[1] Pope *v.* Harrison, 16 Lea, 82; Ferguson *v.* Teel, 82 Va. 690; Cavanaugh *v.* Smith, 84 Ind. 380; Nye *v.* Swan, 42 Minn. 243; Treat *v.* Maxwell, 82 Me. 76; Clyburn *v.* Reynolds, 31 S. C. 91; Horner *v.* State Bank, 1 Ind. 130; 48 Am. Dec. 355; Fogg *v.* Gibbs, 8 Baxt. 464; Acklen *v.* Goodman, 77 Ala. 521; Evans *v.* Young, 10 Col. 316; 3 Am. St. Rep. 583; Luco *v.* Commercial Bank, 70 Cal. 339; Adams *v.* Cowles, 95 Mo. 501; 6 Am. St. Rep. 74; Benefield *v.* Albert, 132 Ill. 665.

[2] Sharp *v.* Brunnings, 35 Cal. 528; Mitchell *v.* Meuley, 32 Tex. 460; Hahn *v.* Kelly, 34 Cal. 391; 94 Am. Dec. 742; Lawler's Heirs *v.* White, 27 Tex. 250; Coit *v.* Haven, 30 Conn. 190; 79 Am. Dec. 244; McClanahan *v.* West, 100 Mo. 309; Williams *v.* Haynes, 77 Tex. 283; 19 Am. St. Rep. 752; Littleton *v.* Smith, 119 Ind. 230; Crim *v.* Kessing, 89 Cal. 478; Cassady *v.* Meller, 106 Ind. 69; Wilkerson *v.* Schoonmaker, 77 Tex. 615; 19 Am. St. Rep. 803.

[3] Pratt *v.* Dow, 56 Me. 81; Granger *v.* Clark, 22 Me. 128; Fitch *v.* Boyer, 8 Rep. 185; Turrell *v.* Warren, 25 Minn. 9.

[4] Yaple *v.* Titus, 41 Pa. St. 202; Shawhan *v.* Loffer, 24 Iowa, 217; Cook *v.* Darling, 18 Pick. 393; Stephenson *v.* Newcomb, 5 Harr. (Del.) 150; Crafts *v.* Dexter, 8 Ala. 767; 42 Am. Dec. 666; Cox *v.* Thomas's Adm'r, 9 Gratt. 323; Finneran *v.* Leonard, 7 Allen, 54; 83 Am. Dec. 665; Blythe *v.* Richards, 10 Serg. & R. 260; 13 Am. Dec. 672; Bragg *v.* Lorio, 1 Woods, 209.

such judgment, in any collateral proceeding.[1] An offer being made to prove that the defendant, at the time of entering judgment, was but two years old, and that no service of process had been made upon him, the court said: "The record in this case is not silent. It recites that due notice had been given. This is a finding of the court, and, being shown by a record importing absolute verity, cannot be contradicted."[2] An action was commenced against a person upon judgment rendered for costs of suit in a case wherein he was plaintiff. He offered to prove that he did not authorize the act of the attorney who instituted the former suit. It was held that while the judgment remained of record he was bound by it, and could only be relieved by some direct application.[3] If the judgment or decree is silent upon the subject of the service of summons, and the service shown by the return upon the summons is not such as will give the court jurisdiction, no doubt the judgment is void.[4] This, however, does not present a case wherein the record is silent, but rather illustrates the proposition that while one part of the record is silent another part may bear witness to a jurisdictional infirmity, destructive of the life and validity of the judgment.

§ 133. **Cases Admitting Parol Evidence.** — Other courts, however, have been deeply impressed by the apparent violation of natural justice involved in condemning a party who has had no opportunity of presenting his defense, — no notice that any of his rights or interests were in jeopardy. Yielding, through a tenderness for the special and unavoidable injustice occasionally done to litigants, they have, in a measure, overlooked the interest of the community as a whole; and rather than sacrifice the

[1] Carpentier *v.* Oakland, 30 Cal. 439; Smith *v.* Smith, 22 Iowa, 516; People *v.* Downing, 4 Sand. 189; Blanchard *v.* Webster, 62 N. H 467.

[2] Richards *v.* Skiff, 8 Ohio St. 586.

[3] Ward *v.* Barber, 1 E. D. Smith, 423; St. Albans *v.* Bush, 4 Vt. 58; 23 Am. Dec. 246; Finneran *v.* Leonard, 7 Allen, 54; 83 Am. Dec. 665.

[4] Swearengen *v.* Gulick, 67 Ill. 208; Bannon *v.* People, 1 Ill. App. 496.

individual for the safety of the community, they have jeopardized the best interests of the community to secure the safety of the individual. To the end that each citizen may feel assured that no injury can be done him in the courts without his notice, actual or constructive, they have impaired public confidence in judicial authority; they have made the title to a large class of property precarious and unstable, by taking away the uncontrollable verity of the record, and substituting for it the interminable uncertainties of parol evidence; and instead of allowing parties who have acquired title at judicial sales to rest secure in the presumption that courts of record always "act by right," those parties have been required, often without notice of the intended attack, to defend proceedings occurring many years previous, and apparently free from vice or infirmity.

The principles which it is thought are sufficient to support the practice of leaving the question of jurisdiction over the parties always open to dispute on collateral proceedings are, that the high and uncontrollable verity of the record never attaches until the court has obtained jurisdiction of the person of the defendant, as well as of the subject-matter of the action; that in the absence of the fact of jurisdiction over the parties, there is no power competent to make a record; that the *thing* offered as a record may be nothing but an unauthorized paper; that the law contemplates, upon reasons of natural justice, that no man shall be deprived of any of his rights of person or property without an opportunity of being heard; that whenever the judgment of any tribunal is about to be used in any proceeding, whether direct or collateral, it is incumbent on the court wherein it is offered to inquire into the jurisdiction of the court rendering the judgment; and that no court can bring a party within its power by virtue of false findings and recitals.[1] It is

[1] Goudy *v.* Hall, 30 Ill. 109; Webster *v.* Reid, 11 How. 437; Gwin *v.* McCarroll, 1 Smedes & M. 351; Baldwin *v.* Kimmel, 16 Abb. Pr. 353; 1 Rob. (N. Y.) 109; Johnson *v.* Wright, 27 Ga. 555.

worthy of consideration that in the greater number of cases usually cited as authority for collateral attacks the language used by the court, though sufficiently general to apply to domestic judgments of courts of general jurisdiction, valid on their face, was employed in determining the effect of judgments either of a sister state, or of a court of limited jurisdiction, or of a court whose want of jurisdiction appeared upon the record. The opinion of Judge Marcy in *Starbuck* v. *Murray*, 5 Wend. 148, 21 Am. Dec. 172, is frequently cited to show that want of jurisdiction over the defendant may always be proven. He, in deciding whether such proof should be received against a record made in *another state*, said: "But it is strenuously contended that if other matter may be pleaded by the defendant, he is estopped from asserting anything against the allegation contained in the record. It imports perfect verity, it is said, and the parties to it cannot be heard to impeach it. It appears to me that this proposition assumes the very fact to be established, which is the only question in issue. For what purpose does the defendant question the jurisdiction of the court? Solely to show that its proceedings and judgments are void, and therefore the supposed record is not in truth a record. If the defendant had not proper notice of and did not appear to the original action, all the state courts, with one exception, agree in opinion that the paper introduced as to him is no record; but if he cannot show, even against the pretended record, that fact, on the alleged ground of the uncontrollable verity of the record, he is deprived of his defense by a process of reasoning that is, to my mind, little less than sophistry. The plaintiffs, in effect, declare to the defendant, the paper declared on is a record, because it says you appeared, and you appeared because the paper is a record. This is reasoning in a circle. The appearance makes the record uncontrollable verity, and the record makes the appearance an unimpeachable fact. The fact which the defendant puts in issue is the validity

of the record, and yet it is contended that he is estopped by the unimpeachable credit of that very record from disproving any one allegation contained in it. Unless a court has jurisdiction, it can never make a record which imports uncontrollable verity to the party over whom it has usurped jurisdiction, and he ought not therefore to be estopped, by any allegation in that record, from proving any fact that goes to establish the truth of a plea alleging a want of jurisdiction. So long as the question of jurisdiction is in issue, the judgment of a court of another state is in its effect like a foreign judgment; it is *prima facie* evidence; but for all the purposes of sustaining that issue, it is examinable into the same extent as a judgment rendered by a foreign court. If the jurisdiction of the court is not impeached, it has the character of a record, and for all purposes should receive full faith and credit." The language of this opinion, though general in terms, was used in relation to the judgment of a court of another state, and therefore, so far as it reflects upon other judgments, is a mere *dictum*. A number of other cases in the same state and elsewhere are, like the one just cited, sound and undoubted as to the points necessarily involved; but as to reflections upon domestic judgments of courts of record, are mere *dicta*.[1]

[1] Borden *v.* Fitch, 15 Johns. 140; 8 Am. Dec. 225; Pollard *v.* Wegener, 13 Wis. 569; Bloom *v.* Burdick, 1 Hill, 130; 37 Am. Dec. 299; Rape *v.* Heaton, 9 Wis. 328; 76 Am. Dec. 269; Pendleton *v.* Weed, 17 N. Y. 72; Steen *v.* Steen, 25 Miss. 513; Chemung Canal Bank *v.* Judson, 8 N. Y. 254; Edwards *v.* Toomer, 14 Smedes & M. 80; Noyes *v.* Butler, 6 Barb. 613; Fitzhugh *v.* Custer, 4 Tex. 399; 51 Am. Dec. 728; Hard *v.* Shipman, 6 Barb. 621; Stallings *v.* Gulley, 3 Jones, 345; Corwin *v.* Merritt, 3 Barb. 341; Elliott *v.* Piersol, 1 Pet. 340; Dobson *v.* Pearce, 12 N. Y. 156; 62 Am. Dec. 152; Smith *v.* Pomeroy, 2 Dill. 414; McCauley *v.* Hargroves, 48 Ga. 50; 15 Am. Rep. 660; Pennywit *v.* Foote, 27 Ohio St. 600; 22 Am. Rep. 340; Spier *v.* Corll, 33 Ohio St. 236; Mastin *v.* Gray, 19 Kan. 458; 27 Am. Rep. 149; reported as Mastin *v.* Duncan, 6 Cent. L. J. 328. In this last case the court permitted the return of service of summons made by a constable to be controverted in an action of ejectment where the judgment founded on such return was collaterally drawn in question. The most candid and comprehensive review of this question which has come within our observation is that contained in the opinion of Rapallo, J., in Ferguson *v.* Crawford, 70 N. Y. 253; 26 Am. Rep. 589. That case was an action brought to foreclose a mortgage. The defense interposed was, that the plaintiff's rights had been barred by a judgment foreclosing a prior mortgage. On the trial the judgment roll in the former case was put in evidence. It contained a no-

## The rule that a judgment of a court of general jurisdiction, whether the record shows jurisdiction affirmatively

tice of appearance for the present plaintiff, purporting to be signed by one Mills as his attorney, and also a consent to judgment signed on behalf of plaintiff by the same attorney. The judgment also recited that summons had been served on the defendants, and that none of them had appeared except the present plaintiff, by John W. Mills, his attorney. The plaintiff then called Mills as a witness, and offered to prove by him, — 1. That Mills's signature to the consent to judgment and notice of appearance was forged; 2. That Mills was never authorized to appear for plaintiff; and 3. That he never did appear.

The learned judge first disposed of the objection that the evidence could not be received without overruling Brown *v.* Nichols, 42 N. Y. 26. That case, he said, was authority for the position that when an attorney had appeared, his want of authority to do so could not be shown on a collateral attack; but here the offer was to show, not only that the attorney had no authority, but further, that he did not in fact appear, and that his supposed signature was a forgery. His honor then proceeded: "The only difficulty in the case arises upon the objection that the evidence offered tends to contradict the record, and from the adjudications which attach to the judgment of a court of general jurisdiction, a conclusive presumption of jurisdiction over the parties, which cannot be contradicted except by matter appearing on the face of the record itself.

"After considerable research I have been unable to find a single authoritative adjudication, in this or any other state, deciding that in the case of a domestic judgment of a court of general jurisdiction, want of jurisdiction over the person may be shown by extrinsic evidence, while there are a great number of adjudications in neighboring states holding that, in the case of such judgments, parties and privies are estopped in collateral actions to deny the jurisdiction of the court over the person as well as the subject-matter, unless it appear on the face of the record that the court had not acquired jurisdiction, and that in such cases there is a conclusive presumption of law that jurisdiction was acquired by service of process or the appearance of the party. The cases are very numerous, but the citation of a few of them will suffice.

"In Cooke *v.* Darling, 18 Pick. 393, in an action of debt on a domestic judgment, the defendant pleaded that at the time of the supposed service upon him of the writ in the original action he was not an inhabitant of the state of Massachusetts; that he had no notice of the action, and did not appear therein.

"This plea was held bad on demurrer, on the ground that the judgment could not be impeached collaterally. In Granger *v.* Clark, 22 Me. 128, also an action on a judgment, the plea was the same, with the addition that the judgment had been obtained by fraud; but it was held to constitute no defense. Coit *v.* Haven, 30 Conn. 190, 79 Am. Dec. 244, was a *scire facias* on a judgment, and the defendant pleaded that the writ in the original action was never served upon him, etc.; and the court held, in an elaborate opinion, that a judgment of a domestic court of general jurisdiction could not be attacked collaterally, unless the want of jurisdiction appeared on the face of the record, and that jurisdictional facts, such as the service of the writ, and the like, were conclusively presumed in favor of such a judgment, unless the record showed the contrary, although this rule did not apply to foreign judgments, or judgments of the courts of sister states, or to domestic judgments of inferior courts, and that the only remedy in such a case was by writ of error or application to a court of equity. The same rule is held in Penobscot R. R. Co. *v.* Weeks, 52 Me. 456; Wingate *v.* Haywood, 40 N. H. 437; Clarke *v.* Bryan, 16 Md. 171; Callen *v.* Ellison, 13 Ohio St. 446; 82 Am. Dec. 448; Horner *v.* Doe, 1 Ind. 131; 48 Am. Dec. 355; Wright *v.* Marsh, 2 Iowa, 94; Prince *v.* Griffin, 16 Iowa, 552; and in numerous other cases which are referred to in the case of Hahn *v.* Kelly, 34 Cal. 391, 94 Am.

or is silent upon that subject, is not subject to collateral attack based upon extrinsic evidence showing want of

Dec. 742, which adopts the same rule and contains a full and instructive discussion of the question.

"There are many cases in other states, and in the courts of the United States, containing expressions general in their character, which would seem to sanction the doctrine that a want of jurisdiction over the person or subject-matter may in all cases be shown by extrinsic evidence, and they are sometimes cited as authorities to that effect: Elliott *v.* Piersol, 1 Pet. 340; Hollingsworth *v.* Barbour, 4 Pet. 466; Hickey *v.* Stewart, 3 How. 750; Shriver *v.* Lynn, 2 How. 43; Williamson *v.* Berry, 8 How. 495; Williamson *v.* Ball, 8 How. 566; Gwin *v.* McCarroll, 8 Smedes & M. 351; Enos *v.* Smith, 7 Smedes & M. 85; Campbell *v.* Brown, 6 How. (Miss.) 106; Shaefer *v.* Gates, 2 B. Mon. 453; 38 Am. Dec. 164; Wilcox *v.* Jackson, 13 Pet. 498; Miller *v.* Ewing, 8 Smedes & M. 421; and numerous other cases not cited. But an examination of these cases discloses that they all relate either to judgments of inferior courts, or courts of limited jurisdiction or courts of general jurisdiction acting in the exercise of special statutory powers, which proceedings stand on the same footing with those of courts of limited and inferior jurisdiction (3 N. Y. 511), or courts of sister states, or to cases where the want of jurisdiction appeared on the face of the record, or to cases of direct proceedings to reverse or set aside the judgment. I have not found one which adjudicated the point now under consideration, otherwise than those to which I have referred. There are some cases which hold that the want of authority of an attorney to appear may be shown by extrinsic evidence, although the record states that an attorney appeared for the party, but those are placed expressly on the ground that such evidence does not contradict the record: Bodurtha *v.* Goodrich, 3 Gray, 508; Shelton *v.* Tiffin, 6 How. 186; 14 How. 340. Those cases are, however, in conflict with the decision of this court in Brown *v.* Nichols, 42 N. Y. 26, and in many other cases.

"The learned annotators of Smith's Leading Cases, Hare and Wallace (1 Smith's Lead. Cas., marg. p. 842), sum the matter up by saying: 'Whatever the rule may be where the record is silent, it would seem clearly and conclusively established by a weight of authority too great for opposition, unless on the ground of local and peculiar law, that no one can contradict that which the record actually avers, and that a recital of notice or appearance, or a return of service by the sheriff in the record of a domestic court of general jurisdiction, is absolutely conclusive, and cannot be disproved by extrinsic evidence.'

"It is quite remarkable, however, that notwithstanding the formidable array of authority in its favor, the courts of this state have never sustained this doctrine by any adjudication, but, on the contrary, the great weight of judicial opinion, and the views of some of our most distinguished jurists, are directly opposed to it.

"As has been already stated, our courts have settled by adjudication, in regard to judgments of sister states, that the question of jurisdiction may be inquired into, and a want of jurisdiction over the person shown by evidence, and have further decided (in opposition to the holding of courts of some of the other states) that this may be done even if it involves the contradiction of a recital in the judgment record. In stating the reasons for this conclusion, our courts have founded it on general principles, quite as applicable to domestic judgments as to others, and, save in one case (Kerr *v.* Kerr, 41 N. Y. 272), have in their opinions made no discrimination between them: Borden *v.* Fitch, 15 Johns. 121; 8 Am. Dec. 225; Starbuck *v.* Murray, 5 Wend. 148; 21 Am. Dec. 172; Noyes *v.* Butler, 6 Barb. 613, and cases cited.

"When we come to consider the effect of these authorities, it is difficult to find any solid ground upon which to rest a distinction between domestic judgments and judgments of sister states in regard to this question; for under the provisions of the constitution of the United States, which require that full faith and credit shall

jurisdiction, is supported by as great a preponderance of authority as is ever likely to support any proposition

be given in each state to the public acts, records, and judicial proceedings of every other state, it is now well settled that when a judgment of a court of a sister state is duly proved in a court of this state, it is entitled here to all the effect to which it is entitled in the courts of the state where rendered. If conclusive there, it is equally conclusive in all the states of the Union; and whatever pleas would be good to a suit therein in the state where rendered, and none others, can be pleaded in any court in the United States: Hampton *v.* McConnel, 3 Wheat. 234; Story's Commentaries on the Constitution, sec. 183; Mills *v.* Duryee, 7 Cranch, 481.

"In holding, therefore, that a defense that the party was not served and did not appear, although the record stated that he did, was good, our courts must have held that such is the law of this state and the common law, and consequently that in the absence of proof of any special law to the contrary in the state where the judgment was rendered, it must be presumed to be also the law of that state. The judgments of our courts can stand on no other logical basis. The distinction which is made in almost all the other states of the Union between the effect of domestic judgments and judgments of sister states, in regard to the conclusiveness of the presumption of jurisdiction over the person, is sought to be explained by saying that in regard to domestic judgments the party aggrieved can obtain relief by application to the court in which the judgment was rendered, or by writ of error, whereas in the case of a judgment rendered against him in another state he would be obliged to go into a foreign jurisdiction for redress, which would be a manifestly inadequate protection, and therefore the constitution may be construed so as to apply only where the persons affected by the judgment were within the operation of the proceeding. This explanation, however, does not remove the difficulty in making the distinction, for if there is a conclusive presumption that there was jurisdiction, that presumption must exist in one case as well as in the other. The question whether or not the party is estopped cannot be made to depend upon the greater inconvenience of getting rid of the estoppel in one case than in another.

"But aside from this observation as to the effect of the authorities, an examination of them shows that our courts did in fact proceed upon a ground common to both classes of judgments. The reasons are fully stated in the case of Starbuck *v.* Murray, 5 Wend. 148; 21 Am. Dec. 172. In that case, which was an action upon a Massachusetts judgment, the defendant pleaded that no process was served on him in the suit in which the judgment sued on was rendered, and that he never appeared therein in person or by attorney, and this plea was held good, notwithstanding that the record of the judgment stated that the defendant appeared to the suit. Marcy, J., in delivering the opinion of the court, and referring to the argument that the defendant was estopped from asserting anything against the allegation of his appearance contained in the record, says." The judge here quoted that part of the opinion of Judge Marcy quoted *ante*, section 133, and then proceeded as follows: —

"This is but an amplification of what is sometimes more briefly expressed in the books, that where the defense goes to defeat the record, there is no estoppel. That the reasoning of Marcy, J., is applicable to domestic judgments is also the opinion of the learned annotators to Phillipps on Evidence: Cowen and Hill's Notes, 1st ed., p. 801, note 551. Referring to the opinion of Marcy, J., before cited, they say: 'The same may be said respecting any judgment, sentence, or decree. A want of jurisdiction in the court pronouncing it may always be set up when it is sought to be enforced, or when any benefit is claimed under it; and the principle which ordinarily forbids the impeachment or contradiction of a record has no sort of application to the case.' The *dicta* of our judges are all to the same effect, although the precise case does not seem to have arisen. In Bigelow *v.* Stearns, 19 Johns. 41, 10 Am. Dec. 189, Spen-

equally debatable, and it must gain strength and adherents unless the national courts shall finally determine

cer, C. J., laid down the broad rule that if a court, whether of limited jurisdiction or not, undertakes to hold cognizance of a cause without having gained jurisdiction of the person by having him before them in the manner required by law, the proceedings are void. In Latham *v.* Edgerton, 9 Cow. 227, Sutherland, J., in regard to a judgment of a court of common pleas, says: 'The principle that a record cannot be impeached by pleading is not applicable to a case like this. The want of jurisdiction is a matter that may always be set up against a judgment when sought to be enforced or where any benefit is claimed under it.' Citing Mills *v.* Martin, 19 Johns. 33, he also says (p. 229): 'The plaintiff below might have applied to the court to set aside their proceedings, but he was not bound to do so. He had a right to lie by until the judgment was set up against him, and then to show that the proceedings were void for want of jurisdiction.' In Davis *v.* Packard, 6 Wend. 327, 332, in the court of errors, the chancellor, speaking of domestic judgments, says: 'If the jurisdiction of the court is general or unlimited both as to parties and subject-matter, it will be presumed to have had jurisdiction of the cause, unless it appears affirmatively from the record, *or by the showing of the party denying the jurisdiction of the court*, that some special circumstances existed to oust the court of its jurisdiction in that particular case.' In Bloom *v.* Burdick, 1 Hill, 130, 37 Am. Dec. 299, Bronson, J., says: 'The distinction between superior and inferior courts is not of much importance in this particular case, for whenever it appears that there was a want of jurisdiction, the judgment will be void in whatever court it was rendered'; and in People *v.* Cassels, 5 Hill, 164, 168, the same learned judge makes the remark that no court or officer can acquire jurisdiction by the mere assertion of it, or by falsely alleging the existence of facts upon which jurisdiction depends. In Harrington *v.* People, 6 Barb. 607, 610, Paige, J., expresses the opinion that the jurisdiction of a court, whether of general or limited jurisdiction, may be inquired into, although the record of the judgment states facts giving it jurisdiction. He repeats the same view in Noyes *v.* Butler, 6 Barb. 613, 617, and in Hard *v.* Shipman, 6 Barb. 621, 623, 624, where he says of superior as well as inferior courts, that the record is never conclusive as to the recital of a jurisdictional fact, and the defendant is always at liberty to show a want of jurisdiction, although the record avers the contrary. If the court had no jurisdiction, it had no power to make a record, and the supposed record is not in truth a record; citing Starbuck *v.* Murray, 5 Wend. 158, 21 Am. Dec. 172. The language of Gridley, J., in Wright *v.* Douglass, 10 Barb. 97, 111, is still more in point. He observes: 'It is denied by counsel for the plaintiff that want of jurisdiction can be shown collaterally to defeat a judgment of a court of general jurisdiction. The true rule, however, is that laid down in the opinion just cited (opinion of Bronson, J., in Bloom *v.* Burdick, 1 Hill, 138, 143; 37 Am. Dec. 299), that in a court of general jurisdiction it is to be presumed that the court has jurisdiction till the contrary appears, but the want of jurisdiction may always be shown *by evidence*, except in one solitary case,' viz.: 'When jurisdiction depends on a fact that is litigated in a suit, and is adjudged in favor of the party who avers jurisdiction, then the question of jurisdiction is judicially decided, and the judgment record is conclusive evidence of jurisdiction, until set aside or reversed by a direct proceeding.'

"The general term in that case held that a judgment of the supreme court was void for want of service of an attachment, notwithstanding that the record averred that the attachment had been duly served and returned, according to law. The judgment in the case cited was reversed (7 N. Y. 564), but not upon the point referred to here. It cannot, however, be held to be an adjudication upon that point, because the judgment was not rendered in the exercise of the general powers of the court, but in pursuance of a special statutory authority.

that it cannot be reconciled with the Fourteenth Amendment to the constitution of the United States, providing

"In the Chemung Canal Bank *v.* Judson, 8 N. Y. 254, the general principle is recognized that the jurisdiction of any court exercising authority over a subject may be inquired into; and in Adams *v.* Saratoga and Washington R. R. Co., 10 N. Y. 328, 333, Gridley, J., maintains, as to the judgments of all courts, that jurisdiction may be inquired into, and disproved by evidence, notwithstanding recitals in the record, and says that such is the doctrine of the courts of this state, although it may be different in some of the other states, and perhaps also in England; and he says the idea is not to be tolerated that the attorney could make up a record or decree reciting that due notice was given to the defendant of a proceeding, when he never heard of it, and the decree held conclusive against an offer to show this vital allegation false. That was a case of a special proceeding, and therefore not an authority on the point. In Pendleton *v.* Weed, 17 N. Y. 75, where a judgment of the supreme court was sought to be attacked collaterally, it is said by Strong, J.: 'It is undoubtedly true that the want of jurisdiction of the person is a good defense in answer to a judgment when set up for any purpose, and that such jurisdiction is open for inquiry'; and by Comstock, J. (p. 77): 'I assent to the doctrine that where there is no suit or process, appearance or confession, no valid judgment can be rendered in any court; that in such a case *the recital in the record of jurisdictional facts is not conclusive*': citing Starbuck *v.* Murray, 5 Wend. 158; 21 Am. Dec. 172. 'I think it is always the right of a party against whom a record is set up to show that no jurisdiction of his person was acquired, and consequently that there was no right or authority to make up the record against him.' Selden and Pratt, JJ., concurred in these views, but the case was disposed of on a different point.

"In Porter *v.* Bronson, 29 How. Pr. 292, 19 Abb. Pr. 236, the court of common pleas of the city of New York held, at general term, that, assuming the marine court to be a court of record, a defendant in an action on a judgment of that court might set up that he was not served with process and did not appear, notwithstanding recitals in the record showing jurisdiction; and in Bolton *v.* Jacks, 6 Rob. (N. Y.) 198, Jones, J., says that it is now conceded, at least in this state, that want of jurisdiction will render void the judgment of any court, whether it be of superior or inferior, of general, limited, or local, jurisdiction, or of record or not, and that the bare recital of jurisdictional facts in the record of a judgment of any court, whether superior or inferior, of general or limited jurisdiction, is not conclusive, but only *prima facie*, evidence of the truth of the fact recited, and the party against whom a judgment is offered is not, by the bare fact of such recitals, estopped from showing, by affirmative proof, that they were untrue, and thus rendering the judgment void for want of jurisdiction. He cites in support of this opinion several of the cases which I have referred to, and Dobson *v.* Pearce, 12 N. Y. 164, and Hatcher *v.* Rocheleau, 18 N. Y. 92.

"It thus appears that the current of judicial opinion in this state is very strong and uniform in favor of the proposition stated by Jones, J., in Bolton *v.* Jacks, 6 Rob. (N. Y.) 198, and if adopted here is decisive of the present case. It has not as yet, however, been directly adjudicated, and if sustained it must rest upon the local law of this state, as it finds no support in adjudications elsewhere. There are reasons, however, founded upon our system of practice, which would warrant us in so holding. The powers of a court of equity being vested in our courts of law, and equitable defenses being allowable, there is no reason why, to an action upon a judgment, the defendant should not be permitted to set up, by way of defense, any matter which would be ground of relief in equity against the judgment; and it is conceded in those states where the record is held conclusive, that when the judgment has been obtained by fraud or without bringing the defendant into court, and the want of jurisdiction does not ap-

that no state shall "deprive any person of life, liberty, or property without due process of law." It may be very

pear upon the face of the record, relief may be obtained in equity.

"The technical difficulty arising from the conclusiveness of the record is thus obviated. In the present case the judgment is set up by the defendants as a bar to the plaintiff's action. But it must be borne in mind that this is an equitable action, being for the foreclosure of a mortgage. The defendants set up the foreclosure in the McFarquahar case as a bar, but being in a court of equity, the plaintiff had a right to set up any matter showing that the defendants ought not in equity to avail themselves of that judgment. They offered to show that it was entered *ex parte* on forged papers. It does not appear that the plaintiff ever had any knowledge of it, and it is not pretended that he was legally summoned. Such a judgment would never be upheld in equity, even in favor of one ignorant of the fraud and claiming *bona fide* under it. He stands in no better position than any other party claiming *bona fide* under a forged instrument.

"The case is analogous in principle to that of Bridgeport Savings Bank *v.* Eldredge, 28 Conn. 557; 73 Am. Dec. 688. That was a bill filed by a second mortgagee to redeem mortgaged premises from a first mortgagee. The first mortgagee had obtained a decree of foreclosure against the second, and the time limited for redemption had expired. The record of the decree found the fact that legal service of the bill in the first suit had been made on the second mortgagee, but in fact none had been made, and he had no actual knowledge of the pendency of the suit until after the time limited for redemption had expired; and he would have redeemed if he had known of the decree.

"It was held, — 1. That the decree was not in any proper sense a bar to the present suit, as a judgment at law would be a bar to a suit at law; but that, without impugning the decree, the court could, for equitable reasons shown, allow a further time for redemption;

"2. That, therefore, the question whether the plaintiff could contradict the record, by showing that no service of the bill was in fact made upon him, did not present itself as a technical one, to be determined by the rules with regard to the verity of judicial records, but only in its relation to the plaintiff's rights to equitable relief, and therefore, that evidence of want of notice was admissible.

"The bill to redeem was not framed to open the former decree, and contained no allegations adapted to or praying for such relief, but was in the ordinary form of a bill for redemption, taking no notice of the previous decree. The decree was set up in the answer, and it was averred that it was rendered on legal notice to the plaintiff. The court, however, held that this defense might be rebutted by evidence of facts which should preclude defendants from taking advantage of a decree of which they could not conscientiously avail themselves.

"Under the system of practice in this state, no reply to an answer setting up new matter is required, but the plaintiff is allowed to rebut it by evidence. Neither is it necessary to anticipate a defense arising upon a deed or record by inserting matter in the complaint in avoidance of it. The defense may never be set up, and the plaintiff is not bound to suppose that it will be. The state of the pleadings, therefore, presents no difficulty. The only question which might be raised is, that McFarquahar, in whose name the decree was obtained, should be before the court; but no such objection was made at the trial, and if it had been, I do not see that he has any interest in the question. All the parties claiming under the decree and sale are parties to this action, and I see no reason why the validity of the McFarquahar foreclosure cannot be tried herein as well as upon a motion or in a separate suit to set aside the decree. The judgment should be reversed, and a new trial ordered." Upon a new trial of this cause, it was held that defendant must assume the burden of satisfactorily disproving jurisdiction; and as he was not able to do this, the judgment against him was sustained: Ferguson *v.* Crawford, 86 N. Y. 609.

seriously contended that to permit a state, through its courts, to make a judicial record against a person, in his absence and without service of process, and then to deny him the right to show that he had no knowledge or notice of the action, and therefore no opportunity to defend it, is to deprive him of property without due process of law. Undoubtedly, if the defendant was not a citizen of the state, and he is sued upon the judgment in another state, he may show that the court did not have jurisdiction over him, no matter what jurisdictional findings or recitals it placed in its record;[1] but this right to controvert in one state the judgment of a court of another state existed independently of the Fourteenth Amendment. Whether that amendment can affect a judgment in a state in which it was pronounced is a question which has never, so far as we are aware, been presented to the supreme court of the United States. In Massachusetts it has been decided, and we think correctly, that one against whom an action is brought in that state, upon a judgment rendered therein, may avoid it by proving that he was not served with process, nor did he appear in the action, and that at the time of the alleged service of process he was an inhabitant and resident of another state.[2] The court pronouncing this decision thought it to be a necessary consequence of the Fourteenth Amendment; but in our judgment, it could more properly have been placed upon the ground that, as the defendant was not a resident or citizen of the state, its courts could not, independently of that amendment, make any record by which to bind him personally. The Fourteenth Amendment is as much a prohibition of the action of a state against its own citizens as against citizens of other states. The chief object of that amendment was the protection of residents of each state from any action on its part which could deprive them of life, liberty, or prop-

[1] Knowles *v.* Gas L. Co., 19 Wall. 58; Thompson *v.* Whitman, 18 Wall. 457.

[2] Needham *v.* Thayer, 147 Mass. 536; Elliott *v.* McCormick, 144 Mass. 10.

erty without due process of law, rather than their protection against the action of states in which they did not reside; and we apprehend that it is not a sufficient answer to one claiming the protection of this amendment, that he is a citizen or resident of the state against or against whose courts he invokes its aid. On the other hand, it may be contended, with equal and we think with greater force, that the rules of law giving effect to jurisdictional recitals, and creating presumptions, whether disputable or indisputable, in favor of judgments of domestic courts of general jurisdiction, are not the result of any legislative or other action on the part of a state, prohibited by the amendment; that these rules existed prior to the adoption of the amendment, independent of any special legislative action, and necessarily attended the creation of the judicial department of the government and the investing it with power to take and exercise jurisdiction over certain subject-matters, and, for that purpose, to require all citizens or residents to appear and submit to its exercise; that it is essential to the effective exercise of this jurisdiction that the courts shall have power, as at common law, to make judicial records of uncontrollable verity, and that such hardships as may arise shall be borne, unless the circumstances are such as warrant the granting of relief in courts of equity, upon the equitable principles there recognized and enforced.

§ 134. **Reasons for Holding the Record Conclusive.**— All the arguments adduced to show that the inquiry into the jurisdiction over the parties in the tribunal pronouncing judgment should on all occasions be considered as open seem to admit of ready answers. That the matters intended by a court of record for its memorials may be proved not to be *a record* by parol evidence is in conflict with the principle recognized from the earliest times of our common law that the plea of *nul tiel record* was to be decided only by inspection of the alleged matter of record.

He may appeal to some higher tribunal and have the judgment reversed; he may move in the tribunal where it was pronounced and have it set aside; or he may seek and obtain equitable aid to prevent its execution. It is true, the court has ample authority to make a record; and it is not true that this authority is dependent upon jurisdiction over the party against whom the record speaks. Neither is it true that maintaining the verity of the record in collateral proceedings is more repugnant to natural justice than the opposite course would be. A party who has been wronged by being judged without any opportunity to make his defense may avoid the adjudication in various ways. He cannot generally affect the rights of innocent third parties, growing out of a judgment regular on its face. But as to those parties, it would be as great a violation of the principles of "natural justice" to deprive them of property acquired for a valuable consideration, by establishing some hidden infirmity preceding the judgment, as it is to deprive the defendant of *his rights* by maintaining the integrity of the record. And as the law cannot minister abstract justice to all the parties, it is at liberty to pursue such a course as will best subserve public policy. This course requires that there should be confidence in judicial tribunals, and that titles resting upon the proceedings of those tribunals should be respected and protected. The hardship arising from an erroneous or inadvertent decision upon jurisdictional questions is no greater than that issuing from an erroneous or inadvertent decision upon other matters. That the reversal of a judgment in an appellate court shall not affect rights acquired under it by third parties, is a rule universally and uncomplainingly acknowledged.

§ 135. **Judgment never Void for Error.** — Jurisdiction being obtained over the person and over the subject-matter, no error or irregularity in its exercise can make

the judgment void.[1] The authority to decide being shown, it cannot be divested by being improperly or incorrectly employed. Error of decision may be corrected, but not so as to reach those who have in good faith relied upon its correctness.[2] The same rules apply to actions to recover delinquent taxes as in other cases, in respect to collateral attacks.[3] It cannot be shown, to avoid the effect of such judgments, that the taxes were previously paid.[4] Neither will such judgment be any the less effective because it appears from the judgment roll that the assessment was illegal and void.[5] The following are instances

[1] Wimbish *v.* Breeden, 77 Va. 324; Walker *v.* Goldsmith, 14 Or. 125; Rosenheim *v.* Hartsock, 90 Mo. 357; Brooks *v.* Brooks, 97 N. C. 136; Levan *v.* Millholland, 114 Pa. St. 49; Young *v.* Sellers, 106 Ind. 101; Sauer *v.* Twining, 81 Ind. 366; Scranton *v.* Ballard, 64 Ala. 402; Fox *v.* Cottage B. F. A., 81 Va. 677; Lindsey *v.* Delano, 78 Iowa, 350; McCoy *v.* Ayres, 2 Wash. 203; Roby *v.* Verner, 31 Kan. 306; Lancaster *v.* Wilson, 27 Gratt. 629; Thaw *v.* Falls, 136 U. S. 519; State *v.* Smith, 100 N. C. 550; Sweet *v.* Ward, 43 Kan. 695; Rollins *v.* Henry, 84 N. C. 569; Wimberly *v.* Hurst, 33 Ill. 166; 83 Am. Dec. 295; Cloud *v.* El Dorado Co., 12 Cal. 128; 73 Am. Dec. 526; Ex parte Watkins, 3 Pet. 193; Preston *v.* Clark, 9 Ga. 246; Blakely *v.* Calder, 61 Pa. St. 621; Boston etc. R. R. Co. *v.* Sparhawk, 1 Allen, 448; 79 Am. Dec. 750; Cailleteau *v.* Ingouf, 14 La. Ann. 623; Bolgiano *v.* Cooke, 19 Md. 375; Savage *v.* Hussey, 3 Jones, 149; Hathaway *v.* Hemmingway, 20 Conn. 191; Feaster *v.* Fleming, 56 Ill. 457; Fleming *v.* Johnson, 26 Ark. 421; Barnum *v.* Kennedy, 21 Kan. 181; Maloney *v.* Dewey, 127 Ill. 395; 11 Am. St. Rep. 131; Chase *v.* Christianson, 41 Cal. 253.

[2] Pursly *v.* Hayes, 22 Iowa, 11; 92 Am. Dec. 350.

[3] Scott *v.* Pleasants, 21 Ark. 364; Eitel *v.* Foote, 39 Cal. 439; Wellshear *v.* Kelly, 69 Mo. 343; Graceland C. Co. *v.* People, 92 Ill. 619; Schmidt *v.* Neimeyer, 100 Mo. 207; Brown *v.* Walker, 85 Mo. 262; Driggers *v.* Cassady, 71 Ala. 529. In Illinois, however, judgments for taxes are not conclusive, where there was no personal service upon or appearance by the owner of the property: Gage *v.* Busse, 114 Ill. 589.

[4] Cadmus *v.* Jackson, 52 Pa. St. 295.

[5] Mayo *v.* Ah Loy, 32 Cal. 477; 91 Am. Dec. 595; Mayo *v.* Foley, 40 Cal. 281; Jones *v.* Gillis, 45 Cal. 541; Anderson *v.* Ryder, 46 Cal. 134; Allen *v.* Ray, 96 Mo. 542; Ward *v.* Dougherty, 75 Cal. 240. These cases seem to me irreconcilable with a portion of the opinion in the case of Reilly *v.* Lancaster, 39 Cal. 354. In Mayo *v.* Ah Loy, 32 Cal. 477, 91 Am. Dec. 595, the court said, that while a tax imposed on property on I Street, to pay for improving J Street, would be unauthorized and invalid, yet if such a tax were assessed, and a suit begun for its collection, a judgment in favor of the plaintiff, if the court had jurisdiction, would be valid. In the case of Mayo *v.* Foley, 40 Cal. 281, it appeared from the record that several lots had been assessed in gross, and that a judgment by default had been rendered in a suit upon such assessment. The assessment was conceded to be invalid. But its want of validity was held not to affect the judgment rendered to enforce it. But in Reilly *v.* Lancaster, 39 Cal. 354, it appeared from the complaint in the record that the tax was levied and assessed by virtue of a certain act of the legislature. This act was unconstitutional. The court decided that the judgment and the sale thereunder were void. Why and upon what principles a person sued for a tax levied by virtue of an unconstitutional law may suffer judgment to be entered against him without

of judgments which, though erroneous or irregular, are not void: Judgments on obligations not yet due,[1] or entered before the expiration of the time allowed to answer,[2] or based upon an assessment of damages by the court when a party was entitled to a jury,[3] or for liquors retailed without a license when the statutes declared that no one shall obtain such judgment;[4] judgment in the absence of taking evidence and making findings, the statute requiring the court, before proceeding to judgment, to take evidence and make findings;[5] a judgment against lands for a sum in gross, when it should have been against each parcel separately,[6] or on a demand which the record shows was barred by the statute of limitations;[7] an order approving the surrender to the firm creditors by the survivors of a partnership of the interest of a deceased partner;[8] an order making an irregular and erroneous appointment of an assignee in bankruptcy;[9] a decree authorizing a sale without redemption, when the statute gave the right to redeem;[10] a judgment based on irregular but amendable proceedings in attachment;[11] an order approving the bond of an assignee in insolvency in a sum less than that fixed by a previous order of the court;[12] an order alleged to have been influenced by the interests of infants, when the court had no right to consider such interest;[13] a decree in foreclosure which was founded on a complaint which

affecting his rights is not explained. This action was brought in a court of general jurisdiction. The court had authority to determine whether the tax was levied under a constitutional law. By rendering judgment for plaintiff, it affirmed the validity of the tax and of the law. Why was this judgment *coram non judice?* If not *coram non judice*, why was it void? The court had jurisdiction of the subject-matter and of the parties. Its decision was erroneous, but not more so that the judgments in question in the cases of Mayo *v.* Ah Loy, 32 Cal. 477, 91 Am. Dec. 595, and Mayo *v.* Foley, 40 Cal. 281.

[1] Mikeska *v.* Blum, 63 Tex. 44.

[2] Essig *v.* Lower, 120 Ind. 239; Solomon *v.* Newell, 67 Ga. 572.

[3] Carter *v.* Roland, 53 Tex. 540.

[4] Rasberry *v.* Pullian, 78 Ala. 191.

[5] Garner *v.* State, 28 Kan. 790; Johnston *v.* San Francisco S. U., 75 Cal. 134; 7 Am. St. Rep. 129.

[6] Pritchard *v.* Madren, 31 Kan. 38.

[7] Head *v.* Daniels, 38 Kan. 1.

[8] Tua *v.* Carriere, 117 U. S. 201.

[9] Raymond *v.* Morrison, 59 Iowa, 371.

[10] Moore *v.* Jeffers, 53 Iowa, 202.

[11] Connolly *v.* Edgerton, 22 Neb. 82; Harvey *v.* Foster, 64 Cal. 296.

[12] Luhrs *v.* Kelly, 67 Cal. 289.

[13] Woodhouse *v.* Fillbates, 77 Va. 317.

did not set out the conditions of the mortgage foreclosed;[1] a decree appointing a new trustee, without giving notice to the trustee superseded thereby;[2] a judgment in a national court founded on an order erroneously directing the removal of a cause from the state court.[3] A judgment of a state court, after it had erroneously refused to remove a cause to the national courts, has also been held to be valid, as long as the party affected thereby does not procure its vacation or reversal in some manner;[4] but this holding was probably erroneous, because on the filing of the proper petition and the taking of proper proceedings for the removal of a cause to a national from a state court, the jurisdiction of the latter seems to absolutely terminate.[5]

§ 135 a. **Judgments without Issue Joined.** — In the preceding section we have shown by numerous citations that when jurisdiction over both the parties and the subject-matter is once obtained, no error committed in the exercise of that jurisdiction can make the proceedings or judgment of the court void. We do not remember ever meeting any direct denial of this rule. But there are cases, or perhaps, more accurately speaking, expressions of the courts, which we are unable to reconcile with the rule. Among these expressions are some, made upon different occasions in the state of Mississippi, in regard to the effect of judgments rendered in the absence of any issue of law or of fact. The high court of errors and appeals in that state, but a few years ago, twice declared that "a judgment without an issue to be determined by it is a nullity";[6] and this language was subsequently cited and approved by the supreme court of the same state.[7] In neither of the cases was any jurisdictional

[1] Berry *v.* King, 15 Or. 165.

[2] Bassett *v.* Crafts, 129 Mass. 513; McKim *v.* Doane, 137 Mass. 195.

[3] Des Moines Nav. & R. R. Co. *v.* Iowa Homestead Co., 123 U. S. 552; Girardy *v.* Bessman, 77 Ga. 483.

[4] Johnson *v.* Brewers' Fire Ins. Co., 51 Wis. 570.

[5] Railroad Co. *v.* Koontz, 104 U. S. 14; Steamship Co. *v.* Tugman, 106 U. S. 118.

[6] Steele *v.* Palmer, 41 Miss. 89; Armstrong *v.* Barton, 42 Miss. 506.

[7] Porterfield *v.* Butler, 47 Miss. 170; 12 Am. Rep. 329.

question presented. The parties seem to have been properly in court. The rendition of the judgments was therefore but an erroneous exercise of the powers possessed by the court. The error, in each instance, was corrected upon appeal. The parties did not undertake to treat the judgments as void; and no doubt the language of the court is attributable to the use of the words "void" and "erroneous" as convertible terms, rather than to any intent of declaring that the judgments before them on appeal were "nullities," in the absolute sense of that term. It has nevertheless, though somewhat timidly, been suggested that it may be true that a judgment without an issue is void, because until an issue is formed there is no question presented to the court for decision,—no subject-matter upon which it can act.[1] If this were true, the power of the judiciary could and would be entirely evaded by defendants neglecting to interpose any defense, for it is only by such interposition that an issue can be formed.

§ 136. **Judgments as Entireties.** — At a comparatively early day in American jurisprudence, a *dictum* was pronounced to the effect that if a judgment is void as against one of the parties thereto it is void as against all.[2] This *dictum* was founded upon an early New York case[3] declaring that on *certiorari* a judgment must be affirmed or reversed as a whole. That in many cases a judgment against two or more must be wholly reversed or vacated because void or erroneous as to one only of them, is true;[4] but whether it is wholly void, if neither reversed nor vacated, is an entirely different question. Upon what principle can a defendant before the court claim its judgment to be void as against him, when the court had

[1] Black on Judgments, sec. 184.

[2] Hall *v.* Williams, 6 Pick. 232; 17 Am. Dec. 356.

[3] Richards *v.* Walton, 12 Johns. 434.

[4] Newburg *v.* Munshower, 29 Ohio, 617; 23 Am. Rep. 769; Frazier *v.* Williams, 24 Ohio, 625; Gargan *v.* School District, 4 Col. 53; Streeter *v.* Marshall, 4 Col. 535; Wootters *v.* Kauffman, 67 Tex. 488; Williams *v.* Chalfant, 82 Ill. 218; Donnelly *v.* Graham, 77 Pa. St. 274; Claflin *v.* Dunne, 129 Ill. 24; 16 Am. St. Rep. 263.

jurisdiction over him and over the subject-matter, and he chooses to take no measures to correct its error? Generally, the courts following the *dictum* mentioned above have contented themselves with citing it as their authority; but so many of them have followed it, that it was at one time very doubtful whether it was not sustained by the majority of the adjudications upon the subject.[1] We think this doubt no longer exists, and that the decided preponderance of authorities maintains that a judgment against two or more is not void as against those of whom the court had jurisdiction, though void as against others.[2]

§ 137. **Judgment for Contempt of Court.**—In Tennessee, it was decided that it is essential to the validity of a judgment for contempt that it should state as ground for its jurisdiction the matters constituting the alleged contempt.[3] But this decision professes to be a departure from the common law, and such it undoubtedly is;[4] for the authorities upon this subject generally affirm that a judgment or sentence for contempt need not state the facts or conduct constituting the supposed contempt,[5] though it should show that the sentence was imposed as a punishment for contempt; and if it merely directs a party to be imprisoned, without indicating that such imprisonment

[1] Holbrook *v.* Murray, 5 Wend. 161; 92 Am. Dec. 584; Wilbur *v.* Abbott, 60 N. H. 40; Martin *v.* Williams, 42 Miss. 210; 97 Am. Dec. 456; Hanley *v.* Donoghue, 59 Md. 239; 43 Am. Rep. 554; Wright *v.* Andrews, 130 Mass. 149; Knapp *v.* Abell, 10 Allen, 485; Buffum *v.* Ramsdell, 55 Me. 252; 92 Am. Dec. 589; Hulme *v.* Jones, 6 Tex. 242; 55 Am. Dec. 774.

[2] Ash *v.* McCabe, 21 Ohio St. 181; Douglass *v.* Massie, 16 Ohio, 271; 47 Am. Dec. 375; Newburg *v.* Munshower, 29 Ohio St. 617; 23 Am. Rep. 769; St. John *v.* Holmes, 20 Wend. 609; 32 Am. Dec. 603; Mercer *v.* James, 6 Neb. 406; Bailey *v.* McGinness, 57 Mo. 362; Cheek *v.* Pugh, 19 Ark. 574; Valentine *v.* Cooley, Meigs, 618; 33 Am. Dec. 166; Lenox *v.* Clark, 52 Mo. 115; Holton *v.* Towner, 81 Mo. 360; Shallcross *v.* Smith, 81 Pa. St. 132; York Bank's Appeal, 36 Pa. St. 460; Winchester *v.* Beardin, 10 Humph. 247; 51 Am. Dec. 702; Crank *v.* Flowers, 4 Heisk. 631; Kitchens *v.* Hutchins, 44 Ga. 620; Gray *v.* Stuart, 33 Gratt. 351; North *v.* Mudge, 13 Iowa, 498; 81 Am. Dec. 411.

[3] State *v.* Galloway, 5 Cold. 326; 98 Am. Dec. 404.

[4] Ex parte Summers, 5 Ired. 149; Burdett *v.* Abbot, 14 East, 1; Stockdale *v.* Hansard, 9 Ad. & E. 1; Sheriff of Middlesex's Case, 11 Ad. & E. 273.

[5] Easton *v.* State, 39 Ala. 551; 87 Am. Dec. 49; State *v.* Woodfin, 5 Ired. 199; 42 Am. Dec. 161; Lord Mayor's Case, 3 Wils. 188, 204.

is for contempt, he is entitled to his release on *habeas corpus.*[1] In California, the statute "regulating contempts and their punishment provides that when the alleged contempt is not committed in the presence of the court an affidavit of the facts constituting the contempt must be presented. If there be no affidavit presented, there is nothing to set the power of the court in motion, and if the affidavit as presented be one which upon its face fails to state the substantive facts which, in point of law, do or might constitute a contempt on the part of the accused, the same result must follow; for there is no distinction in such a case between the utter absence of an affidavit and the presentation of one which is defective in substance in stating the facts constituting the alleged contempt." Therefore an order of a court punishing a man for contempt not committed in the presence of the court, unless it is based upon an affidavit sufficient in substance, is void.[2] Judgments entered punishing persons for contempt of court are subject to review in superior courts upon jurisdictional grounds. They are sometimes brought up on appeal,[3] sometimes on *certiorari*,[4] and are frequently, in effect, reviewed on writs of *habeas corpus;*[5] and the action of the court is sometimes arrested by a writ of prohibition.[6] Nevertheless, all courts, so far as we are aware, disclaim the power to review sentences for contempt imposed by other courts for any error committed in imposing them, unless such appeal has been expressly given by statute.[7] A judgment punishing for a contempt of court is generally a finality from which no appeal or

[1] Ex parte Adams, 25 Miss. 883; 59 Am. Dec. 234.

[2] Batchelder *v.* Moore, 42 Cal. 415.

[3] People *v.* O'Neil, 47 Cal. 109; Heurstal *v.* Muir, 64 Cal. 450; Neel *v.* State, 9 Ark. 259; 50 Am. Dec. 218. But the California decisions, permitting appeals from sentences imposing punishment for contempt of court, have been overruled: Tyler *v.* Connolly, 65 Cal. 28; In Matter of Vance, 88 Cal. 262.

[4] Batchelder *v.* Moore, 42 Cal. 415.

[5] Ex parte Rowe, 7 Cal. 181; Ex parte Cohen, 6 Cal. 318.

[6] People *v.* Wright, 27 Cal. 151; Heurstal *v.* Muir, 64 Cal. 450.

[7] Appeals were allowed in Stuart *v.* People, 3 Scam. 395; McCredie *v.* Senior, 4 Paige, 378; Shannon *v.* State, 18 Wis. 604.

writ of error lies;[1] nor can release from imprisonment thereunder be obtained by writ of *habeas corpus* upon the ground of error of law or of fact,[2] though both under this writ and upon *certiorari* relief may be had upon the ground of want of jurisdiction in the court imposing the sentence, and perhaps, where the facts are disclosed by the record, upon the ground that they did not constitute a contempt and were not punishable as such.[3]

§ 138. **Sundays and Holidays.** — "Sunday is *dies non juridicus;* and by the common law all judicial proceedings which take place on that day are void."[4] If, however, a court is authorized to receive the verdict of a jury on Sunday, and is required by law, "upon a verdict, to immediately render judgment accordingly," it must, if a verdict is received on Sunday, give judgment thereon on the same day.[5] Holidays, other than Sundays, are not non-judicial days, unless expressly made so by statute, and judgments rendered thereon are valid.[6]

§ 139. **Judgment without Authority of Court.** — Where plaintiff, in open court, offered to let defendant take judg-

[1] State *v.* Galloway, 5 Cold. 326; 98 Am. Dec. 404; State *v.* Towle, 42 N. H. 450; State *v.* Woodfin, 5 Ired. 199; 42 Am. Dec. 162; People *v.* Kelly, 24 N. Y. 74; Easton *v.* State, 39 Ala. 551; 87 Am. Dec. 49; Casey *v.* State, 25 Tex. 38; Williamson's Case, 26 Pa. St. 9; 67 Am. Dec. 374; Clark *v.* People, Breese, 340; 12 Am. Dec. 177, and note; Shattuck *v.* State, 51 Miss. 50; 24 Am. Rep. 624; State *v.* Thurmond, 37 Tex. 340; Patton *v.* Harris, 15 B. Mon. 607; Robb *v.* McDonald, 29 Iowa, 330; 4 Am. Rep. 211; Vilas *v.* Burton, 27 Vt. 56; Cossart *v.* State, 14 Ark. 538; Sanchez *v.* Newman, 70 Cal. 210; In Matter of Vance, 88 Cal. 262.

[2] State *v.* Galloway, 5 Cold. 326; 98 Am. Dec. 404; Williamson's Case, 26 Pa. St. 9; 67 Am. Dec. 374; Ex parte Adams, 25 Miss. 883; 59 Am. Dec. 234; People *v.* Cassels, 5 Hill, 164; Burnham *v.* Morrisey, 14 Gray, 226; 74 Am. Dec. 676; Ex parte Maulsby, 13 Md. 621; In re Cooper, 32 Vt. 253; Matter of Morton, 10 Mich. 208.

[3] State *v.* Towle, 42 N. H. 540; Perry's Case, 30 Wis. 268; Ex parte Perkins, 18 Cal. 60; Ex parte Summers, 5 Ired. 149; Batchelder *v.* Moore, 42 Cal. 412; Piper *v.* Pearson, 2 Gray, 120; 61 Am. Dec. 438; Dunham *v.* State, 6 Iowa, 245.

[4] Chapman *v.* State, 5 Blackf. 111; Blood *v.* Bates, 31 Vt. 147; Swann *v.* Broome, 3 Burr. 1595; Pearce *v.* Atwood, 13 Mass. 324; Arthur *v.* Mosby, 2 Bibb, 589; Story *v.* Elliott, 8 Cow. 27; 18 Am. Dec. 423; Davis *v.* Fish, 1 G. Greene, 406; 48 Am. Dec. 387; Allen *v.* Godfrey, 44 N. Y. 433.

[5] Thompson *v.* Church, 13 Neb. 287; Weame *v.* Smith, 32 Wis. 412.

[6] Spalding *v.* Bernhard, 76 Wis. 268; 20 Am. St. Rep. 75; Bear *v.* Youngman, 19 Mo. App. 41; Glenn *v.* Eddy, 51 N. J. L. 255; 14 Am. St. Rep. 684; Hamer *v.* Sears, 81 Ga. 288; Pfister *v.* Stone, 84 Ala. 432; Slater *v.* Schack, 31 Minn. 269.

ment for costs, and tendered his confession to that effect, which the defendant refused to accept and the court declined to enter, the clerk, at request of plaintiff's attorney, entered the confession in the minutes of the court: Held, that this entry, being without consent, and in face of the decision of the court, was a nullity.[1] In a very recent case the force of an apparent appointment of an administrator was permitted to be destroyed by proof that the surrogate in fact never acted upon the application and knew nothing of it, the appointment having been written by the clerk upon a blank previously signed by the surrogate.[2] But in another case a decree entered without being legally settled, and in violation of the express directions which the clerk's minutes showed were given by the court in relation to the provisions to be inserted, no motion being made to correct or set it aside, was regarded as the valid decree of the court.[3]

§ 140. **Deceased Defendant.** — If jurisdiction be obtained over the defendant in his lifetime, a judgment rendered against him subsequently to his death is not void.[4]

§ 141. **A Judgment against a Party not Named** in the complaint, nor in any other part of the record, is void, where it does not appear that he was a party intended to be sued by one of the names inserted in the complaint, or that he was served with process. It will not be presumed that one who does not appear to have been a party had his day in court.[5] The effect of a judgment against one incorrectly named in the record, or designated therein by a fictitious name, will be considered in another section.[6]

[1] Barefield *v.* Bryan, 8 Ga. 463.

[2] Roderigas *v.* East River S. I., 76 N. Y. 316; 32 Am. Rep. 309.

[3] Cushman *v.* Shepard, 4 Barb. 113.

[4] Collins *v.* Mitchell, 5 Fla. 364; Loring *v.* Folger, 7 Gray, 505; Coleman *v.* McAnulty, 16 Mo. 173; 57 Am. Dec. 229; Yaple *v.* Titus, 41 Pa. St. 203; Day *v.* Hamburg, 1 Browne (Pa.), 75; Gregory *v.* Haynes, 21 Cal. 443. For *contra* opinion, see Carter *v.* Carriger, 3 Yerg. 411; 24 Am. Dec. 585; also Morse *v.* Toppan, 3 Gray, 411, where it is said that judgment "must be against one capable of contracting, for it is a debt." For further consideration of this subject, see section 153.

[5] Ford *v.* Doyle, 37 Cal. 346; Moseley *v.* Cocke, 7 Leigh, 225.

[6] *Post*, sec. 154.

§ 142. **Jurisdiction Continues till Judgment.** — Jurisdiction over a party, being obtained, continues until judgment; and he must therefore take notice of all the proceedings until that time. After judgment he is not regarded as always present and under control of the court. An order made after judgment setting aside a sale, no notice being given to the adverse party, will not avail the party who procured it.[1] Various motions may be made and proceedings taken after final judgment, either to correct it by amendment, to vacate it for some error or irregularity, to avoid it by writ or error or appeal, or to control process issued for its enforcement. Of these proceedings, unless they necessarily result from a mere inspection of the record, the parties are entitled to notice; but such notice may generally be given to their attorneys, who, notwithstanding the entry of judgment, are regarded as still representing them for the purpose of receiving notices of motions.

§ 143. **Jurisdiction for Certain Purposes only.** — Sometimes a court may have jurisdiction over the defendant for certain purposes only. Thus by a statute of the state of Ohio, jurisdiction was given the court of common pleas over absent defendants on publication of notice, "in all cases properly cognizable by courts of equity, where either the title to or boundaries of land may come in question, or where a suit in chancery becomes necessary to obtain the rescission of a contract for the conveyance of land, or to compel the specific execution of such contract." Acting under this statute, an absent defendant was proceeded against, by publication of notice, to compel the specific performance of a contract, and to obtain judgment for a sum of money claimed by the plaintiff under such contract. The court gave a decree for the performance, and also for the sum of money, and authorized a levy to be made to satisfy the decree. The action of the court

[1] Wright *v.* Leclaire, 3 Iowa, 221.

in awarding the sum of money was attempted to be justified on the ground that a court having jurisdiction for one purpose might exercise it for the complete settlement of the matters in controversy, but such action was declared void for want of jurisdiction over the defendant for the purpose of rendering a personal judgment against him for a sum of money.[1] In the same state, proceedings were instituted to foreclose a mortgage. Service of summons was made by publication. A personal judgment was taken against the defendant. This judgment was declared to be absolutely void, because the statute did not authorize any other judgment than one for the sale of the premises to satisfy the debt secured by the mortgage.[2]

§ 144. **Disqualification of the Judge.** — It occasionally happens that while a court has jurisdiction over the subject-matter in controversy, and the parties to the action, the judge of the court is disqualified from acting by reason of his having an interest in the suit, or his being related to some of the parties, or his being within some of the disqualifications recognized by the common or by the statute law. "It is a maxim of every country that no man should be judge in his own cause. The learned wisdom of enlightened nations, and the unlettered ideas of ruder societies, are in full accordance upon this point, and wherever tribunals of justice have existed, all men have agreed that a judge shall never have the power to decide where he is himself a party. In England it has always been held that, however comprehensive may be the terms by which jurisdiction is conferred upon a judge, the power to decide his own cause is always a tacit exception to the authority of his office. Such I conceive to be the law of this state."[3] These principles extend not only to cases in which the judge is a party upon the record, but also to

[1] Boswell *v.* Dickerson, 4 McLean, 262.

[2] Wood *v.* Stanberry, 21 Ohio St. 142.

[3] Wash. Ins. Co. *v.* Price, 1 Hopk. Ch. 1.

other cases in which he has an interest, however minute, as where one of the parties is a corporation of which the judge is one of the stockholders.[1]

§ 145. **At Common Law.** — While it is well settled by the common law that no judge ought to act where, from interest or from any other cause, he is supposed to be partial to one of the suitors, yet his action in such a case is regarded as an error or irregularity not affecting his jurisdiction, and to be corrected by a vacation or reversal of his judgment, except in the case of those inferior tribunals from which no appeal or writ of error lies.[2] "If the facts are known to the party recusing, he is bound to make his objection before issue joined, and before the trial is commenced, otherwise he will be deemed to have waived the objections, in cases where a statute does not make the proceedings void. Except in cases where a statute forbids it, the parties by a joint application to the judge, suggesting the ground of recusation, expressly waiving all objections on that account, and requesting him to proceed with the trial or hearing, signed by them, or their attorneys, may give the judge full power to proceed as if no objection existed. This is denominated in civil and Scotch law prorogated jurisdiction; and a tacit prorogation is inferred against a plaintiff who brings his cause before a judge who is known to him to be disqualified to try it; and against a defendant, who, knowing the existence of just grounds of recusation, appears, and without objecting offers defenses in the cause, either dilatory or peremptory."[3]

[1] Place *v.* Butternuts Mfg. Co., 28 Barb. 503; Gregory *v.* C. C. & C. R. R. Co., 4 Ohio St. 675; Wash. Ins. Co. *v.* Price, 1 Hopk. Ch. 1.

[2] Dimes *v.* Grand Junction Canal Co., 47 Jur. 73; 16 Eng. L. & Eq. 63; Heydenfeldt *v.* Towns, 27 Ala. 423; Gorrill *v.* Whittier, 3 N. H. 268; McMillan *v.* Nichols, 62 Ga. 36; Rhea's Succession, 31 La. Ann. 323; Stearns *v.* Wright, 51 N. H. 609; Trawick *v.* Trawick, 67 Ala. 271; Fowler *v.* Brooks, 64 N. H. 423; 10 Am. St. Rep. 425; Rogers *v.* Felker, 77 Ga. 46; Beal *v.* Sinquefield, 73 Ga. 48.

[3] Moses *v.* Julian, 45 N. H. 52; 84 Am. Dec. 114; Shropshire *v.* State, 12 Ark. 160; Ellsworth *v.* Moore, 5 Iowa, 486; Baldwin *v.* Calkins, 10 Wend. 167.

§ 146. **Statutory Prohibitions.** — In most of the states, statutes have been passed which, in direct terms, prohibit judges from acting in certain specified cases. Thus in Massachusetts, it was provided that when a judge of probate was interested in an estate, the same should be settled in another county; and in Alabama, the statute enacted that "no judge of probate shall act in any proceeding or take jurisdiction of any matter wherein he is interested." In both of these states it has been decided that the action of any judge in any matter where he is interested is *coram non judice* and void.[1] A statute in New York directed that "no judge of any court shall act as such in any cause to which he is a party, or in which he is interested, or in which he would be disqualified from being a juror by reason of consanguinity or affinity to either of the parties." This was held to divest the judge of jurisdiction in the extreme sense, so that the consent of the parties could not give him any authority in the case. "The party who desired it might be permitted to take the hazard of a biased decision if he alone were to suffer for his folly; but the state cannot endure the scandal and reproach which would be visited upon its judiciary in consequence. Although the party consent, he will invariably murmur if he do not gain his cause; and the very man who induced the judge to act when he should have foreborne will be the first to arraign his decision as biased and unjust. If we needed an illustration of this, the attempt which the counsel for the moving party in this case assumed toward the court, the strain of argument he addressed to it, and the impression it was calculated to make upon an audience are enough to show that, whatever a party may consent to do, the state cannot afford to yield up its judiciary to such attack and criticism as will inevitably follow upon their decisions made in dis-

[1] Cottle, Appellant, 5 Pick. 483; Coffin *v.* Cottle, 9 Pick. 287; Sigourney *v.* Sibley, 21 Pick. 101; 32 Am. Dec. 248; Gay *v.* Minot, 3 Cush. 352; State *v.* Castleberry, 23 Ala. 85.

regard of the prohibitions of the statute under consideration."[1] This language shows in a clear and forcible manner the evils resulting from the practice of permitting any judge to act under any circumstances in a matter wherein his judgment is likely to be attributed to improper motives. Nevertheless, it is stipulated, in many of the statutes upon this subject, that he may act by consent of the parties interested. But the general effect of the statutory prohibitions in the several states is undoubtedly to change the rule of the common law so far as to render those acts of a judge, involving the exercise of judicial discretion, in a case wherein he is disqualified from acting, not voidable merely, but void.[2] The language of the statutory prohibition to which this effect is attributed is, generally, that the judge in the cases mentioned therein "shall not sit," or "shall not act," or "shall not preside," or "shall not have any voice," or "cannot sit."[3] In some of the states the statute permits a judge, otherwise disqualified, to act with the consent of the parties, and where such statutes are in force a party who does not object to the judge until after judgment is pronounced is deemed to have consented to his acting.[4] But a judge

[1] Oakley *v.* Aspinwall, 3 N. Y. 547.

[2] Horton *v.* Howard, 79 Mich. 642; 19 Am. St. Rep. 198; Chicago & A. R. R. Co. *v.* Summers, 113 Ind. 10; 3 Am. St. Rep. 616; Newcome *v.* Light, 58 Tex. 141; 44 Am. Rep. 604; Reams *v.* Kearns, 5 Cold. 217; Converse *v.* McArthur, 17 Barb. 410; Schoonmaker *v.* Clearwater, 41 Barb. 200; Chambers *v.* Clearwater, 1 Keyes, 310; Estate of White, 37 Cal. 190; Chambers *v.* Hodges, 23 Tex. 104; People *v.* De la Guerra, 24 Cal. 73; Ochus *v.* Sheldon, 11 Fla. 138. Where the statute prohibits the judge from acting in certain cases, unless by consent of the parties entered of record, the supreme court of Alabama in a recent case said: "We think that justice will be best subserved by ruling that the disabilities mentioned render the proceedings of the court voidable only, and not void. These disqualifications may be unknown, or so obscure as to require a judicial decision to determine their existence. It is a serious thing to annul the judgments of the courts, and it ought not to be done where the consent of the parties alone is requisite to their validity, and its entry on the record is the only admissible evidence that it was given": Hines *v.* Hussey, 45 Ala. 513. Act of probate judge in Massachusetts in appointing wife's brother administrator of estate of which her father was creditor, being a case in which the judge was disqualified, was held void: Hall *v.* Thayer, 105 Mass. 219; 7 Am. Rep. 513.

[3] See cases in preceding citation, and Buckingham *v.* Davis, 9 Md. 324; Wigand *v.* Dejonge, 8 Abb. N. C. 260; Price *v.* Bowers, 8 Baxt. 353; Newcome *v.* Light, 58 Tex. 141; 44 Am. Rep. 604; Hilton *v.* Miller, 5 Lea, 395; Horton *v.* Howard, 79 Mich. 642; 19 Am. St. Rep. 198; Frevert *v.* Swift, 19 Nev. 363.

[4] Wroe *v.* Greer, 2 Swan, 172; Crozier *v.* Goodwin, 1 Lea, 125.

disqualified from trying a cause may make such orders as "are merely formal, or as are necessary for the continuance of the cause to a future term at which a qualified judge may be present."[1] On this ground it has been decided that a judge who is assignee may, as such assignee, confess judgment against himself in the capacity of assignee, in his own court; and that if any judge is sued in his own court, there is no objection to his entering judgment against himself upon his own confession, as such entry does not require any judicial investigation or determination.[2] Statutory prohibitions must give way to the necessities of justice, and to the paramount right of litigants to have justice administered. Hence though a judge is interested in a cause, or otherwise disqualified, yet if there is no other judge competent to try it, he may proceed to hear and determine it, if his refusal to do so must result in a total or substantial denial of justice.[3]

§ 147. **Where Two out of Three Judges** were disqualified from acting, by reason of having been attorneys in the case, and the parties stipulated for trial before a single judge, the judgment pronounced by such judge, the others sitting *pro forma*, in order to constitute a court, was held to be valid.[4] The correctness of this decision is, however, questionable, the general rule being that if a judge is disqualified he shall not sit; and that a court in which he with other judges participates is not properly constituted, and its judgments ought not to stand.[5]

[1] Buckingham *v.* Davis, 9 Md. 324; Heydenfeldt *v.* Towns, 27 Ala. 423; Moses *v.* Julian, 45 N. H. 52; 84 Am. Dec. 114; Estate of White, 37 Cal. 190.

[2] Thornton *v.* Lane, 11 Ga. 520.

[3] Matter of Ryers, 72 N. Y. 1; 28 Am. Rep. 88; Heydenfelt *v.* Towns, 27 Ala. 423; Commonwealth *v.* Ryan, 5 Mass. 92; Pierce *v.* Atwood, 13 Mass. 340; Thelluson *v.* Rendlesham, 6 H. L. Cas. 429. The same principle permits disqualified jurors to act, if otherwise the cause cannot be tried: Bassett *v.* Governor, 11 Ga. 207; Commonwealth *v.* Brown, 147 Mass. 585; 9 Am. St. Rep. 736.

[4] Walker *v.* Rogan, 1 Wis. 597; Queen *v.* Justices of London, 18 Q. B. 421.

[5] Oakley *v.* Aspinwall, 3 N. Y. 547; Gorrill *v.* Whittier, 3 N. H. 268; Hesketh *v.* Braddock, 3 Burr. 1847; Queen *v.* Justices of Hertfordshire, 6 Q. B. 753.

§ 148. **Judge de Facto.** — One who supposes himself to be invested with an office, and who, not being a mere usurper, acts in good faith as a judge, may constitute a court *de facto*. An objection to his authority or commission must be made before the trial, or it will be disregarded.[1] Where the constitution of a state required a judge to be thirty years of age, it was decided that if the appointing power selected some person as a judge who was less than thirty years old, his acts were valid until he was removed from office.[2] The authority of a judge *de facto* cannot be called in question collaterally. His title to the office can be considered and determined only in some proceeding instituted for that purpose.[3] Hence the judgment of a *de facto* court or judge must be respected as valid in all collateral proceedings, though the official term of the person acting as judge had not yet begun,[4] or had terminated,[5] or the statute authorizing him to act or providing the mode of his appointment is unconstitutional,[6] or he is acting under an appointment by officers having no power to make such appointment,[7] or as the officer of a sovereign whose authority over the territory has ceased.[8] Where special judges may be appointed to act in place of the regularly elected and qualified judge, if a judgment appears to have been rendered by a special judge it cannot be collaterally assailed, unless the record affirmatively discloses his want of authority.[9]

[1] Case *v.* State, 5 Ind. 1; State *v.* Anone, 2 Nott & McC. 27; State *v.* Alling, 12 Ohio, 16; Masterson *v.* Matthews, 60 Ala. 260. See Hildreth's Heirs *v.* McIntyre's Devisee, 1 J. J. Marsh. 206; 19 Am. Dec. 61, and note, at page 66, on officers *de facto*.

[2] Blackburn *v.* State, 3 Head, 690.

[3] Pepin *v.* Lachenmeyer, 45 N. Y. 27; State *v.* Murdock, 86 Ind. 124; Wilcox *v.* Smith, 5 Wend. 231; 21 Am. Dec. 213; Woodside *v.* Wagg, 71 Me. 207; Keyes *v.* United States, 109 U. S. 336; Johnson *v.* McGinly, 76 Me. 432; Campbell *v.* Commonwealth, 96 Pa. St. 344; Baker *v.* Wambaugh, 99 Ind. 312.

[4] McCraw *v.* Williams, 33 Gratt. 510.

[5] Gilliani *v.* Reddick, 4 Ired. 368; Carli *v.* Rheuer, 27 Minn. 292; Cromer *v.* Boinest, 27 S. C. 436; Sheehan's Case, 122 Mass. 445; 23 Am. Rep. 374; Hamlin *v.* Kassafer, 15 Or. 456; 3 Am. St. Rep. 176.

[6] State *v.* Carroll, 38 Conn. 449; 9 Am. Rep. 409; Burt *v.* Winona, 31 Minn. 472; Masterson *v.* Matthews, 60 Ala. 260; Brown *v.* O'Connell, 36 Conn. 432; 4 Am. Rep. 89; Frazer *v.* Freelon, 53 Cal. 644.

[7] Mallett *v.* G. & S. M. Co., 1 Nev. 188; 90 Am. Dec. 484.

[8] Keene *v.* McDonough, 8 Pet. 308.

[9] Littleton *v.* Smith, 119 Ind. 230; Schlungger *v.* State, 113 Ind. 295.

§ 148 a. **Judgment Fraudulently Altered.** — The clerk of a court, at the instance of a judgment creditor, altered a judgment by default from four thousand four hundred to four thousand five hundred dollars. This judgment, having subsequently been collaterally drawn in question, was held to be void, in an opinion from which we present the following extract: "We admit that we have been unable to find any reported authority precisely applicable to this case; but we are clearly of the opinion that the doctrine uniformly held which renders void a note, bond, or bill which has been altered in a material part by the party in whose interest the alteration has been made must apply with equal, if not greater, force to judgments in courts of record. In most of the states the act of altering a public record, we think, would not only be held to render void any interest the party making the fraudulent alteration might have in the record, but it would be an indictable offense. We do not hesitate, then, to say that the judgment was void from and after the alteration."[1]

[1] Hardy *v.* Broaddus, 35 Tex. 668.

# CHAPTER IX.

## OF THE PERSONS AFFECTED BY JUDGMENT.

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§ 190. Distributee of common fund.

PART I. — OF THE PARTIES.

§ 149. **Who may be Parties.** — The power and authority of our courts extend over every class of persons and every species of property situate within the territorial limits in which those courts are authorized to act, and subject to the same sovereignty which organized the courts and invested them with judicial functions. Every subject is therefore liable to be made a party litigant, and to be bound by the result of the litigation; and those who are not subjects may, if they choose, appear and submit to the jurisdiction of a court, and after so doing, its judgment is as binding upon them as upon residents.[1] If a citizen or resident is privileged from the service of process at the time it is served upon him, the court cannot take notice of such privilege. He must appear and assert it by some motion or other proceeding; and failing to do so, and even if he did so and the court overruled his plea, its judgment against him is valid.[2] The conviction of a person for crime, and his sentence to imprisonment for life, are often spoken of as resulting in his civil death, and the inference is drawn that he can no longer do any act or be proceeded against in the courts. This, we think, is a mistaken view. While his conviction and sentence suspend many of his civil rights, they do not seem to destroy his obligations, nor to vest his estate in his heirs; and this being so, it must follow that those having obligations against him must be permitted to enforce

[1] Theriot *v.* Bayard, 37 La. Ann. 689.
[2] Prentis *v.* Commonwealth, 5 Rand. 697; 16 Am. Dec. 782; Peters *v.* League, 13 Md. 58; 71 Am. Dec. 622; Gyers *v.* Irwin, 4 Dall. 107; McPherson *v.* Nesmith, 3 Gratt. 241; Thornton *v.* American W. M. Co., 83 Ga. 288; 20 Am. St. Rep. 320.

them in the courts. To hold otherwise would be to punish them for his crime.[1] In Kansas, when one is imprisoned for a term less than life, a trustee may be appointed to take charge of and manage his estate, who may prosecute and defend all actions commenced by or against him, and the courts of that state have declared that though an action has been begun while the defendant was not a convict, yet on his subsequent conviction and imprisonment he became civilly dead, and that a judgment based on a service of process on him in prison was void.[2] In Virginia, under similar circumstances, the judgment is valid.[3]

§ 150. **Married Women.** — Those disabilities arising from infancy, from coverture, or from mental infirmities which render parties incapable of being bound by their contracts do not have the effect of exempting any person from the control of the courts. Reasoning from the hypothesis that a judgment is a contract, a few of the courts have held that parties exempt from the force of their agreements could not be bound by a judgment. Thus it was said in one case: "The fact that defendant was a married woman when the judgment was rendered against her would alone be a good plea to this action. A judgment is in the nature of a contract; it is a specialty, and creates a debt, and to have that effect, it must be taken against one capable of contracting a debt."[4] The case just cited sustains the doctrine that a married woman may, when sued upon a claim arising during coverture, disregard the process of the court, and assert against any judgment rendered thereon the defense of coverture

[1] Avery *v.* Everett, 110 N. Y. 317; 6 Am. St. Rep. 368, and note; Bowles *v.* Haberman, 95 N. Y. 246.

[2] Rice Co. *v.* Lawrence, 29 Kan. 158.

[3] Neale *v.* Utz, 75 Va. 480.

[4] Morse *v.* Toppan, 3 Gray, 411; but the rule in this state has been modified by statute: Larrabee *v.* Colby, 99 Mass. 559; Goodman *v.* Hill, 125 Mass. 587. In Wood *v.* Ward, 8 Cent. L. J. 188, in the circuit court of the United States for the southern district of Ohio, it was adjudged that a judgment against one who was a slave, and who, therefore, in the state where such judgment was entered, had no capacity to sue or defend, could not conclude such person in any subsequent judicial proceeding.

which was available to her as before the judgment. A judgment against a *feme covert* upon a note, made during her coverture, was also deemed a nullity in Maryland. The principle that a party cannot impeach a judgment on any ground which might have been pleaded as a defense, it was thought had no application to such a case, because the defendant was not competent to employ an attorney to present her plea.[1] The decision thus made in Maryland, though it no longer correctly expresses the law of that state,[2] has been approved in Missouri, and the reasons for such approval were expressed in the following form: "It is very clear, to my mind, that the respondent was not competent to employ an attorney, or make a defense in her own name. She was sued in a legal proceeding upon a personal contract altogether void at law; and shall the entry of an unauthorized judgment against her by default for non-appearance be allowed to prejudice her? The principle that a party cannot impeach a judgment in a collateral proceeding does not apply to a case where the defendant is a *feme covert*, and not *sui juris*. As the respondent labored under a total disability, and could neither contract nor be sued at law, I think the judgment of the law commissioner's court was void."[3] The spirit[4] of the decisions in Pennsylvania, Mississippi, Louisiana, Kentucky, and West Virginia is, no doubt, in accord with that manifested in Missouri. In the first-named state, a wife is liable upon certain contracts made in reference to the improvement of her separate estate. Upon these contracts she may be sued, and a valid judgment may be rendered against her. But "every judgment against her which does not show upon its face her liability is a void

[1] Griffith *v.* Clarke, 18 Md. 457.

[2] Shupp *v.* Hoffman, 72 Md. 359; 20 Am. St. Rep. 476; Ahern *v.* Fink, 18 Md. 457; Lowekamp *v.* Koechling, 64 Md. 95.

[3] Higgins *v.* Peltzer, 49 Mo. 152; Will *v.* Simmons, 66 Mo. 617.

[4] White *v.* Foote L. Co., 29 W. Va. 385; 6 Am. St. Rep. 650; Mallett *v.* Parham, 52 Miss. 921; White *v.* Bird, 20 La. Ann. 281; Parsons *v.* Spencer, 83 Ky. 305, and on subsequent appeal, 13 S. W. Rep. 72 (Ky.); Wells *v.* Norton, 28 La. Ann. 309; Magruder *v.* Buck, 56 Miss. 314; Hecker v. Haak, 88 Pa. St. 238; Gould *v.* McFall, 111 Pa. St. 66.

judgment."[1] This is the rule generally adopted in the states wherein common-law judgments against married women are ordinarily void. If circumstances exist making such judgment proper, they must be disclosed by the record,[2] unless recovered before a justice of the peace, when in some of the states the well-known imperfections of justices' records have induced the courts to relax the rule requiring the record to show the exceptional facts justifying a recovery against a married woman.[3] If an unmarried woman is sued, her subsequent marriage does not abate the action, nor prevent the recovery of a valid judgment against her therein.[4]

Notwithstanding the decisions to which we have referred, the preponderance of authority is in favor of the rule that a judgment against a married woman is not void; and that when erroneous because based upon a contract which she was not competent to make, or from any other reason, it is still binding upon her until set aside upon appeal or by some other appropriate method. "The acts of *femes covert in pais* may be, and frequently are, void; yet this does not impair the conclusive force of judgments to which they are parties; and if they be not reversed on error or appeal, their effects cannot be gainsaid when they are enforced by ultimate process, or when they are brought to bear on their rights in any future controversy. And a judgment against husband and wife may be satisfied out of the property of either, or out of the common property."[5] "There would be no safety in purchasing at

[1] Swayne *v.* Lyon, 67 Pa. St. 439; Caldwell *v.* Walters, 18 Pa. St. 79; 55 Am. Dec. 592; Dorrance *v.* Scott, 3 Whart. 309; 31 Am. Dec. 509; Van Dyke *v.* Wells, 103 Pa. St. 49; Hartman *v.* Ogborn, 54 Pa. St. 120; 93 Am. Dec. 679.

[2] McKinney *v.* Brown, 130 Pa. St. 365; Cary *v.* Dixon, 51 Miss. 593.

[3] Taggert *v.* Muse, 60 Miss. 870.

[4] King *v.* Jones, 2 Ld. Raym. 1525; Doe *v.* Butcher, 3 Maule & S. 557; Phillips *v.* Stewart, 27 Ga. 402; Roosevelt *v.* Dale, 2 Cow. 581; Parker *v.* Steed, 1 La. 206.

[5] Howard *v.* North, 5 Tex. 290; 51 Am. Dec. 769; Baxter *v.* Dear, 24 Tex. 17; 76 Am. Dec. 88; Spalding *v.* Wathen, 7 Bush, 659; Guthrie *v.* Howard, 32 Iowa, 54; Wolf *v.* Van Metre, 23 Iowa, 397; Glover *v.* Moore, 60 Ga. 189; Mashburn *v.* Gouge, 61 Ga. 512; McCullough *v.* Dashiell, 85 Va. 37; Chatterton *v.* Young, 2 Tenn. Ch. 768; Howell *v.* Hale, 5 Lea, 405; Wright *v.* Wright, 97 Ind. 444; McDaniel *v.* Carver, 40 Ind. 250; Lieb *v.* Lichtenstein, 121 Ind. 483; Vatilburg *v.* Black, 3 Mont. 459; Keith *v.* Keith, 26 Kan. 26; Vick *v.* Pope, 81 N. C. 22;

judicial sales under judgments rendered after due service of process on female defendants, if the title of the purchaser could be defeated by proof in a collateral action that the defendant in the judgment was a married woman at the time of the institution of the suit, or that she was incapable in law of contracting the debt for which the judgment was rendered."[1] Where a mortgage was made by a woman, in her maiden name, five days after her marriage, and *scire facias* was thereafter regularly prosecuted against her on the mortgage to judgment, and a sale was had in pursuance thereof, it was held that the judgment could not, in an action of ejectment, be impeached by proof of her coverture.[2] Judgments against *femes covert* cannot be set aside or enjoined in equity, without establishing such facts as would entitle the applicant to relief independent of the fact of coverture, with the exceptions of judgments shown to have been obtained through the fraud of the husband, in combination with another person. It is not enough that a married woman prove facts sufficient to have avoided the judgment in the first instance. She must allege and establish that she was deprived of a full defense by the contrivance of her adversary. The inaction of her husband will not sustain the charge of connivance.[3] Ignorance of her legal rights, on account of which a *feme covert* failed to make her defense at law, will not entitle her to relief in equity.[4] In Pennsylvania, the bond of a married woman, though her husband join in it, is void. A judgment entered on such bond by warrant of attorney is void; and so is the judg-

Nicholson *v.* Cox, 83 N. C. 44; 35 Am. Rep. 556; Winter *v.* City Council, 79 Ala. 481. Some of the decisions were doubtless influenced by statutes permitting married women to sue and be sued: Huff *v.* Wright, 39 Ga. 41; Van Metre *v.* Wolf, 27 Iowa, 341; Larrabee *v.* Colby, 99 Mass. 559; Goodnow *v.* Hill, 125 Mass. 587; Davis *v.* First Nat. Bank, 5 Neb. 242; 25 Am. Rep. 484; Wilson *v.* Herbert, 41 N. J. L. 456; 32 Am. Rep. 243; Patrick *v.* Littell, 36 Ohio St. 79; 38 Am. Rep. 552; Rogers *v.* Weil, 12 Wis. 664; Lewis *v.* Gunn, 63 Ga. 542; Cashman *v.* Henry, 75 N. Y. 103; 31 Am. Rep. 437; Farris *v.* Hayes, 9 Or. 81.

[1] Gambette *v.* Brock, 41 Cal. 83.

[2] Hartman *v.* Ogborn, 54 Pa. St. 120; 93 Am. Dec. 679.

[3] Green *v.* Branton, 1 Dev. Eq. 500.

[4] Van Metre *v.* Wolf, 27 Iowa, 341.

ment in *scire facias* to revive such judgment, and a sale thereunder passes no title.[1]

§ 151. **Infants.** — In Illinois, a decree of a court of general jurisdiction, where the record shows that notice was served on an infant defendant in person, instead of on his guardian as required by statute, and no guardian *ad litem* was appointed, is void.[2] This is, however, an almost isolated exception to the current of authorities. In Kentucky, by the provisions of the Civil Code, no judgment is to be rendered against an infant until after defense by a guardian. Yet a judgment pronounced after constructive service on an infant, without the appointment of any guardian, was held to be erroneous, but binding until reversed.[3] The general tendency is to regard the plea of infancy as a personal plea which may be waived.[4] And whether such plea is interposed or not, a judgment or decree against an infant, properly before the court, is as obligatory upon him as though he were an adult, except in cases where he is allowed time, after coming of age, to show cause against the judgment or decree.[5] If an absolute decree is made against an infant, he is as much bound as a person of full age, and will not be permitted to dispute the decree, except upon the same grounds which would be available if he were an adult.[6] Though the statute requires the appointment of a guardian *ad litem* to represent the interests of minors who have no general guardian, it is well settled that where process has been

[1] Dorrance *v.* Scott, 3 Whart. 309; 31 Am. Dec. 509; Caldwell *v.* Walters, 18 Pa. St. 79; 55 Am. Dec. 592; Graham *v.* Long, 65 Pa. St. 383.

[2] Whitney *v.* Porter, 23 Ill. 445.

[3] Simmons *v.* McKay, 5 Bush, 25.

[4] Blake *v.* Douglass, 27 Ind. 416.

[5] Waring's Heirs *v.* Reynolds, 3 B. Mon. 59; Marshall *v.* Fisher, 1 Jones, 111; Pond *v.* Donegby, 18 B. Mon. 558; Smith *v.* Ferguson, 3 Met. (Ky.) 424; Ralston *v.* Lahee, 8 Iowa, 23; Beeler *v.* Bullitt, 3 A. K. Marsh. 280; 13 Am. Dec. 161; Bennett *v.* Hamill, 2 Schoales & L. 575; Porter *v.* Robinson, 3 A. K. Marsh. 254; 13 Am. Dec. 153; Wills *v.* Spraggin, 3 Gratt. 567; Smith *v.* McDonald, 42 Cal. 484.

[6] Joyce *v.* McAvoy, 31 Cal. 273; 89 Am. Dec. 172; English *v.* Savage, 5 Or. 518; Brown *v.* Lawson, 51 Cal. 615; Wilhite *v.* Wilhite, 124 Ind. 226; Lawson *v.* Moorman, 85 Va. 880; Sumner *v.* Sessoms, 94 N. C. 371; Burgess *v.* Kirby, 94 N. C. 575; Walkenhurst *v.* Lewis, 24 Kan. 420; Sites *v.* Eldredge, 45 N. J. Eq. 632; 14 Am. St. Rep. 769.

served upon a minor the failure to appoint a guardian *ad litem* for him is a mere irregularity not affecting the validity of the judgment.[1] The fact that defendant is a minor does not, however, ordinarily dispense with the necessity of obtaining jurisdiction over his person by the service of process in substantial compliance with the statute. The general rule is, that neither a minor nor his guardian can waive such service, unless authorized to do so by some statute.[2] In some of the states it seems that when the proceedings are in chancery, or in courts having jurisdiction of the estates of deceased persons, the courts regard themselves as possessing general jurisdiction over all infants, or as proceeding *in rem*, and therefore authorized to proceed, when infants are parties defendant or otherwise interested in the action or proceeding, without any service of process upon them, to appoint guardians *ad litem* for them, and thereafter to dispose of the cause and enter a final order or decree binding upon them.[3] Generally, however, service of process upon a minor must precede the appointment of a guardian *ad litem* for him; and though such guardian is appointed, and appears and represents the interests of an infant defendant, his appointment and all subsequent proceedings, including the final judgment, are void as against an infant not served with process.[4] In California, if a minor defendant has a general guardian, the latter may enter his

[1] Millard *v.* Marmon, 116 Ill. 649; Eisenmenger *v.* Murphy, 42 Minn. 84; 18 Am. St. Rep. 493; Peak *v.* Shasted, 21 Ill. 137; 74 Am. Dec. 83; Powell *v.* Gott, 13 Mo. 458; 53 Am. Dec. 153; Parker *v.* Starr, 21 Neb. 686; Porter *v.* Robinson, 3 A. K. Marsh. 253; 13 Am. Dec. 153; O'Hara *v.* McConnell, 93 U. S. 150; Barber *v.* Graves, 18 Vt. 290; Montgomery *v.* Carlton, 56 Tex. 561; Boyd *v.* Roane, 49 Ark. 397.

[2] Genobles *v.* West, 23 S. C. 154; Young *v.* Young, 91 N. C. 359; Winston *v.* McLendon, 43 Miss. 254; Abdil *v.* Abdil, 26 Ind. 287; Finley *v.* Robertson, 17 S. C. 435; Kansas City *v.* Campbell, 62 Mo. 585; Cox *v.* Story, 80 Ky. 64.

[3] Sheldon's Lessee *v.* Newton, 3 Ohio St. 494; Heroman *v.* Louisiana Inst., 34 La. Ann. 805; Robb *v.* Irwin, 15 Ohio, 689; Preston *v.* Dunn, 25 Ala. 507; McAnear *v.* Epperson, 54 Tex. 220; 38 Am. Rep. 625.

[4] Galpin *v.* Page, 18 Wall. 350; Kremer *v.* Haynie, 67 Tex. 450; Chambers *v.* Jones, 72 Ill. 275; Moore *v.* Starks, 1 Ohio St. 369; Good *v.* Norley, 28 Iowa, 188; Roy *v.* Rowe, 90 Ind. 54; Insurance Co. *v.* Bangs, 103 U. S. 435; McCloskey *v.* Sweeney, 66 Cal. 53; Ingersoll *v.* Mangram, 84 N. Y. 622; Young *v.* Young, 91 N. C. 359; Coleman *v.* Coleman, 3 Dana, 398; 28 Am. Dec. 86; Allsmiller *v.* Freutchenicht, 86 Ky. 198.

appearance without any service of process, and a judgment based thereon is valid.[1]

§ 152. **Lunatics.** — While an occasional difference of opinion manifests itself in regard to the propriety and possibility of binding *femes covert* and infants by judicial proceedings in which they were not represented by some competent authority, no such difference has been made apparent in relation to a more unfortunate and more defenseless class of persons; but by a concurrence of judicial authority, lunatics are held to be within the jurisdiction of the courts.[2] Judgments against them, it is said, are neither void nor voidable. They cannot be reversed for error on account of defendant's lunacy; the proper remedy in favor of a lunatic being to apply to chancery to restrain proceedings, and to compel plaintiff to go there for justice.[3] In a suit against a lunatic, the judgment is properly entered against him, and not against his guardian. A lunatic has capacity to appear in court by attorney. The legal title to his estate remains in him, and does not pass to his guardian. A judgment, to be effective, cannot therefore be against any other person than the lunatic.[4]

§ 153. **Deceased Parties.** — The decisions respecting the effect of judgments for or against persons who were not living at the time of their rendition are conflicting and unreasonable. Some of them apparently affirm that a judgment so rendered is void under all circumstances,[5]

[1] Smith *v.* McDonald, 42 Cal. 484; Grouffier *v.* Puymirol, 19 Cal. 629.

[2] Lamprey *v.* Nudd, 9 Fost. 299; Wood *v.* Bayard, 63 Pa. St. 320; Foster *v.* Jones, 23 Ga. 168; Sacramento Savings Bank *v.* Spencer, 53 Cal. 737; Stigers *v.* Brent, 50 Md. 214; 33 Am. Rep. 317; 10 Cent. L. J. 473; Johnson *v.* Pomeroy, 31 Ohio St. 247; Crow *v.* Meyersieck, 88 Mo. 411; Boyer *v.* Berryman, 123 Ind. 451; Dunn *v.* Elliott, 60 Tex. 337; Brittain *v.* Mull, 99 N. C. 483; Allison *v.* Taylor, 6 Dana, 87; 32 Am. Dec. 68; King *v.* Robinson, 33 Me. 114; 54 Am. Dec. 614; Woods *v.* Brown, 93 Ind. 164; 47 Am. Rep. 369.

[3] Sternberg *v.* Schoolcraft, 2 Barb. 153; Robertson *v.* Lain, 19 Wend. 650; Clark *v.* Dunham, 4 Denio, 262.

[4] Walker *v.* Clay, 21 Ala. 797.

[5] Nolan *v.* Cameron, 9 Lea, 234; Gerault *v.* Anderson, Walk. (Miss.) 30; 12 Am. Dec. 521; Wert *v.* Jordan, 62 Me. 484; Lee *v.* Gardner, 26 Miss. 521; Parker *v.* Horne, 38 Miss. 215; Tarleton *v.* Cox, 45 Miss. 430; Young *v.* Pickens, 45 Miss. 553; New Orleans &

and others that it is valid under all circumstances, because its rendition implies that the parties for and against whom it was given were then living, and that to show that either was then dead is to dispute the verity of the record, and therefore not permissible.[1] We apprehend that neither position is correct. That there should, at some time during its progress, be living parties to both sides of an action we think indispensable; and that no sort of jurisdiction can be obtained against one who was dead when suit was commenced against him as a defendant, or in his name as plaintiff; and that no judicial record can be made which will estop those claiming under him from showing that he died before the action was begun; and that a judgment for or against him must necessarily be void.[2] Probably if the plaintiff is merely one in whose name an action is prosecuted for the benefit of another, and the defendant, knowing this, does not plead the fact of plaintiff's death, but suffers judgment, he cannot avoid it afterwards on account of such death.[3] On the other hand, if an action is begun by and against living parties, over whom the court obtains jurisdiction, and some of them subsequently die, it is not thereby deprived of its jurisdiction; and while it ought not to proceed to judgment without making the representatives or successors in interest of the deceased party parties to the action, yet if it does so proceed its action is irregular merely, and its judgment is not void.[4]

C. R. R. Co. *v.* Bosworth, 8 La. Ann. 80; Norton *v.* Jamison, 23 La. Ann. 102; McCloskey *v.* Wingfield, 29 La. Ann. 141; Edwards *v.* Whited, 29 La. Ann. 647; Carter *v.* Carriger's Adm'r, 3 Yerg. 411; 24 Am. Dec. 585; Ewald *v.* Corbett, 32 Cal. 493; McCreery *v.* Everding, 44 Cal. 286; but these California cases are overruled: Phelan *v.* Tyler, 64 Cal. 80. Judgment against an extinct corporation is void: Sturges *v.* Vanderbilt, 73 N. Y. 384; Clay *v.* Buchanan, 63 Iowa, 188.

[1] Carr *v.* Townsend, 63 Pa. St. 202; Taylor *v.* Snow, 47 Tex. 462; 26 Am. Rep. 311; Warder *v.* Tainter, 4 Watts, 270; Murray *v.* Weigle, 118 Pa. St. 159.

[2] Bollinger *v.* Chouteau, 20 Mo. 89; Williams *v.* Hudson, 93 Mo. 524; Crosley *v.* Hutton, 98 Mo. 196; Loring *v.* Folger, 7 Gray, 505; Graves *v.* Ewart, 99 Mo. 1.

[3] Powell *v.* Washington, 15 Ala. 803.

[4] Knott *v.* Taylor, 99 N. C. 511; 6 Am. St. Rep. 547; Jennings *v.* Simpson, 12 Neb. 558; Evans *v.* Spurgin, 6 Gratt. 107; 52 Am. Dec. 105; Phelan *v.* Tyler, 64 Cal. 80; Wallace *v.* Center, 67 Cal. 133; Harrison *v.* McMurray, 71 Tex. 122; Gilman *v.* Donovan, 53 Iowa, 362; Fleming *v.* Seligson, 57 Tex. 524; Gid-

§ 154. **Judgments Generally Bind None but the Parties thereto.**—"*Res inter alios acta alteri nocere non debet.*" "A transaction between two parties ought not to operate to the disadvantage of a third."[1] The application of this maxim to the law of judgments requires that no person shall be affected by any judicial investigation to which he was not a party, unless his relation to some of the parties was such as to make him responsible for the final result of the litigation. It is a general rule that an adjudication takes effect only between the parties to the judgment, and that it gives no rights to or against third parties.[2] Though the above maxim is more generally quoted than the maxim, "*Res inter alios acta, aliis nec prodest, nec nocet,*"—"A transaction between other parties neither benefits nor injures those not interested,"—yet this latter maxim is far more applicable to judgments, and to every kind of estoppel, than the former, because it expresses the truth that no person can bind another by any adjudication, who was not himself exposed to the peril of being bound in a like manner had the judgment resulted the other way. Whether a judgment is relied upon as an estoppel, an adjudication of the validity or invalidity of a claim or writing, the foreclosure of a lien, or as a muniment of title, it is inadmissible,[3] except as against persons who

dings *v.* Steele, 28 Tex. 733; 91 Am. Dec. 336; King *v.* Burdett, 28 W. Va. 601; 57 Am. Rep. 687; Levasey *v.* Antram, 24 Ohio St. 96; Yaple *v.* Titus, 31 Pa. St. 195; 80 Am. Dec. 604; Mitchell *v.* Schoonover, 16 Or. 211; 8 Am. St. Rep. 282; Claflin *v.* Dunne, 129 Ill. 24; 16 Am. St. Rep. 263; Spalding *v.* Wathen, 7 Bush, 659; Coleman *v.* McAnulty, 16 Mo. 173; 57 Am. Dec. 229; Camden *v.* Robertson, 2 Scam. 508; Stoetzell *v.* Fullerton, 44 Ill. 108; Case *v.* Ribelin, 1 J. J. Marsh. 30; Hayes *v.* Shaw, 20 Minn. 405; Reid *v.* Holmes, 127 Mass. 326.

[1] Broom's Legal Maxims, 858.

[2] Pothier on Obligations, pt. 4, c. 3, sec. 3, art. 5; Society etc. *v.* Hartland, 2 Paine, 536; Chase *v.* Swain, 9 Cal. 136; Peters *v.* Spitzfaden, 24 La. Ann. 111; McIntosh *v.* Jarvis, 8 U. C. Q. B. 535; Doe *v.* Dennison, 8 U. C. Q. B. 610; Clubine *v.* McMullen, 11 U. C. Q. B. 250; Macky *v.* Coates, 70 Pa. St. 350; Samuel *v.* Agnew, 80 Ill. 553; Rice *v.* Coolidge, 121 Mass. 393; 23 Am. Rep. 279; Hill *v.* Stevenson, 63 Me. 364; 18 Am. Rep. 231; John *v.* Northcutt, 49 Tex. 444; Bradley *v.* Rodelsperger, 17 S. C. 9; Harvey *v.* State, 94 Ind. 159; Schuster *v.* Rader, 13 Col. 330; Kramer *v.* Matthews, 68 Ind. 172; McCoy *v.* McCoy, 29 W. Va. 794.

[3] Goodnow *v.* Plumbe, 64 Iowa, 672; Townsend's Succession, 36 La. Ann. 447; Bethlehem *v.* Watertown, 51 Conn. 490; McDonald *v.* Matney, 82 Mo. 358; Scates *v.* King, 110 Ill. 456; Montgomery Co. *v.* Severson, 64 Iowa, 326; Montgomery *v.* Road, 34 Kan. 122; Pratt *v.* Jones, 64 Tex. 694;

were parties to the suit, or in privity with such parties, or in such a position that they were the real parties in interest in a litigation conducted for their benefit in the name of another under such circumstances as to make them answerable for the result of the litigation, by virtue of principles to be hereinafter stated. Thus a judgment against a husband, in a suit to which his wife is not a party, to settle and establish the boundary lines of lands which in fact belong to her, cannot affect her, though the judgment purports to be against both.[1] A mortgagee of a husband is not prejudiced by a judgment in an action brought against the husband by his wife subsequent to the execution of the mortgage to obtain a decree adjudging the husband to hold the lands in trust for the wife.[2] The foreclosure of a mechanic's lien against a husband cannot divest the separate estate of his wife.[3] An action to determine the ownership of a promissory note is inoperative as against a claimant thereof not a party to such action.[4] Creditors of a husband are not bound by the result of a litigation between him and his wife to which they were not parties.[5] A foreclosure and sale do not affect the right of pre-existing judgment creditors not parties thereto.[6] A decree establishing a lien on a railroad is not binding on the bond-holders when neither they nor their trustees were parties to the suit.[7] One not a party to an action is not bound by a judgment entered therein, though he attempted to enjoin its prosecution,[8] or offered to become a party, but was denied that privi-

Strauss *v.* Ayres, 87 Mo. 348; Helphrey *v.* Redick, 21 Neb. 80; Empire *v.* Darlington, 101 U. S. 87; Hyatt *v.* McBurney, 18 S. C. 199; Hale *v.* Finch, 104 U. S. 261; Flanders *v.* Seeley, 105 U. S. 718; Glaze *v.* Watson, 55 Tex. 563; Melhop *v.* Seaton, 77 Iowa, 153; Chase *v.* Kaynor, 78 Iowa, 449; Lipscomb *v.* Postell, 38 Miss. 476; 77 Am. Dec. 651; Cameron *v.* Cameron, 15 Wis. 1; 82 Am. Dec. 652; Brush *v.* Fowler, 36 Ill. 53; 85 Am. Dec. 382.

[1] Durst *v.* Amyx, 13 S. W. Rep. 1087 (Ky.).

[2] Boutwell *v.* Steiner, 84 Ala. 307; 5 Am. St. Rep. 375.

[3] Franklin Sav. Bank *v.* Taylor, 131 Ill. 376.

[4] Proctor *v.* Cole, 120 Ind. 102.

[5] Old Folks' Society *v.* Millard, 86 Tenn. 657.

[6] Whitney *v.* Huntington, 37 Minn. 197.

[7] Hassall *v.* Wilcox, 130 U. S. 493.

[8] Gage *v.* McGregor, 61 N. H. 47.

lege.[1] The fact that a person was a party to an action in its earlier stages does not bind him by the judgment, unless he was also a party when it was rendered. If he, by permission of the court, withdrew from the action, or dismissed it either by consent of the court, or without such consent when he had a right to act in its absence, then the power of the court over him terminates, and a judgment subsequently entered cannot affect his interests.[2] If in a proceeding supplementary to execution a bank, through its officers, is summoned before a referee and examined, and thereupon an order of court is made requiring the bank to pay to the judgment creditor moneys deposited with it in the name of the judgment debtor's wife, and payment is made accordingly, such judgment and payment cannot affect the wife's right to recover her deposit from the bank, though she was also called before the referee and examined as a witness in the supplemental proceedings.[3]

The persons who are directly parties to a judgment can generally be ascertained by an inspection of the record; but this is not always the case. It may happen that the name of some of the parties is incorrectly stated. The weight of authority is, that if the writ is served on the party, by a wrong name, intended to be sued, and he fails to appear and plead the misnomer in abatement, and suffers judgment to be obtained, he is concluded, and in all future litigation may be connected with the suit or judgment by proper averments; and when such averments are made and proved, the party intended to be

[1] Coleman *v.* Hunt, 77 Wis. 263.

[2] Owens *v.* Alexander, 78 N. C. 1; Ryan *v.* Heenan, 75 Iowa, 589; Ocheltree *v.* Hill, 77 Iowa, 721.

[3] Schrauth *v.* Dry Dock S. B., 86 N. Y. 390.

[4] National Bank *v.* Jaggers, 31 Md. 38; 100 Am. Dec. 53; Ins. Co. *v.* French, 18 How. 409; Smith *v.* Bowker, 1 Mass. 76; Oakley *v.* Giles, 3 East, 168; Smith *v.* Patten, 6 Taunt. 115; Crawford *v.* Satchwell, 2 Strange, 1218; Guinard *v.* Heysinger, 15 Ill. 288; Walsh *v.* Kirkpatrick, 30 Cal. 202; 89 Am. Dec. 85; Hoffield *v.* Board of Education, 33 Kan. 644; Parry *v.* Woodson, 33 Mo. 347; 84 Am. Dec. 51; Fitzgerald *v.* Salentine, 10 Met. 436; Waldrop *v.* Leonard, 22 S. C. 18; Bloomfield R. R. Co. *v.* Burress, 82 Ind. 83; Peterson *v.* Little, 74 Iowa, 223; Robertson *v.* Winchester, 85 Tenn. 171.

named in the judgment is affected as though he were properly named therein.[1] So if persons are sued and judgment is entered against them by the name of "Childs, Gould, & Co.," it cannot be treated as void on the ground that the name used was not one known to the law.[2] In an action to which there were four defendants, the names of but three appeared in the margin of the entry upon the record, which recited the verdict of the jury and the judgment of the court. This was held to be a valid judgment against all who were properly and technically parties defendant in the suit, on the ground that this entry was to be construed by referring to the process, pleadings, and proceedings in the action.[3] The identity of names in the record of a former suit with those in a present suit *prima facie* establishes identity of parties; but if the record fails to demonstrate the identity, it may be shown by evidence *aliunde*.[4] An action may be commenced and process issued and served against a defendant by a fictitious name, when his name is unknown to plaintiff. When the true name of a party so sued and served becomes known, the complaint should be amended by inserting it. The fact that such amendment is not made does not, however, render void a judgment against him, where he has appeared in the action.[5] In Georgia, a mortgage may be foreclosed without making the grantee of the mortgagor a party to the suit;[6] but the judges seem to be divided in opinion as to whether such foreclosure is, under all circumstances, conclusive against such grantee of all the matters established by the decree.[7] Very singularly, it has been supposed that if a mortgagor conveys the mortgaged property a suit to foreclose can be prosecuted against him, without making his grantee a

[1] Barry *v.* Carothers, 6 Rich. 331.
[2] Bennett *v.* Child, 19 Miss. 362; 88 Am. Dec. 692.
[3] Wilson *v.* Collins, 11 Humph. 189.
[4] Garwood *v.* Garwood, 29 Cal. 514; Thompson *v.* Manrow, 1 Cal. 428.
[5] Campbell *v.* Adams, 50 Cal. 203; Tyrrell *v.* Baldwin, 67 Cal. 1; Johnston *v.* S. F. S. U., 75 Cal. 154; Curtis *v.* Herrick, 14 Cal. 117; 73 Am. Dec. 632.
[6] Knowles *v.* Lawton, 18 Ga. 476; 58 Am. Dec. 290.
[7] Guerin *v.* Danforth, 45 Ga. 493.

party, and a judgment obtained, under which the latter's title and equity of redemption can be cut off.[1] But there is no principle in support of this supposition; and the authorities are now nearly, if not quite, unanimous in asserting that when the mortgagor's grantees are not parties the judgment cannot affect their title.[2] As against strangers to the suit, a decree of divorce is not evidence of the marriage of the parties to it.[3]

§ 155. **General Expressions.**—In all cases where the expression in the judgment is general, it will be confined to the parties served with process.[4] Thus where there are two defendants, one of whom is served with process and pleads, and the judgment entry recites that the *parties* came by their attorneys, it will be intended that no one came but he who had been summoned and had pleaded.[5] In Vermont, a record similar to this was differently construed.[6] In a later case in that state, the record showed service of process on two out of four defendants. The judgment recital was, "that defendants came by their attorney." This entry, it was held, did not show an appearance as to more than the two defendants served. As to the former case, it was said to be supportable only upon the assumption that in an action where there were but two defendants the use of the plural term "*parties*" was inconsistent with the theory that any less than two persons appeared.[7] In Colorado, a judgment against the defendants, one only being served with process, was treated as being against both, and was therefore reversed.[8] If,

[1] Street *v.* Bell, 16 Iowa, 68; 85 Am. Dec. 504.

[2] Berlack *v.* Halle, 22 Fla. 236; 1 Am. St. Rep. 185; Goodenow *v.* Ewer, 16 Cal. 471; 76 Am. Dec. 540; Boggs *v.* Hargrave, 16 Cal. 559; 76 Am. Dec. 561; San Francisco *v.* Lawton, 18 Cal. 465; 79 Am. Dec. 187; Childs *v.* Childs, 10 Ohio St. 339; 75 Am. Dec. 512; Terrill *v.* Allison, 21 Wall. 292; Scates *v.* King, 110 Ill. 456.

[3] Gourand *v.* Gourand, 3 Redf. 262.

[4] Chester *v.* Miller, 13 Cal. 561; Malaney *v.* Hughes, 50 N. J. L. 546; Edwards *v.* Toomer, 14 Smedes & M. 76; Miller *v.* Ewing, 8 Smedes & M. 421. This rule cannot apply when each of the defendants is named in the judgment: Ownings *v.* Binford, 80 Ala. 421.

[5] Puckett *v.* Pope, 3 Ala. 552.

[6] Blood *v.* Crandall, 28 Vt. 396.

[7] Hubbard *v.* Dubois, 37 Vt. 94; 86 Am. Dec. 690.

[8] Langley *v.* Gull, 1 Col. 71.

during the pendency of an action, a *nolle prosequi* is entered as to some of the defendants, a general judgment subsequently taken against the "defendants" will be construed to include only those as to whom no *nolle prosequi* was entered.[1]

§ 156. **In Same Capacity.** — Every person may, at different times, or at the same time, occupy different relations, act in different capacities, and represent separate and perhaps antagonistic interests. It is a rule of both the civil[2] and the common law[3] that a party acting in one right can neither be benefited nor injured by a judgment for or against him, when acting in some other right. As familiar illustrations of this rule, it is said that a judgment against one as tutor[4] will not prevent his recovering the same demand in his own right; that "a woman is not estopped after coverture by an admission on record of herself and her husband during coverture; and an heir claiming as heir of his mother is not estopped by an estoppel upon him as the heir of his father."[5] A plaintiff suing as administrator of his wife is not affected by a judgment against himself in her lifetime, in an action to which she was not a party.[6] A decree against one as administrator on a bill to compel the delivery of slaves claimed as a gift from the intestate will not conclude his rights as a creditor on a bill by him against the former plaintiffs to set aside the gift conveyance for fraud.[7] Nor is a decree against the validity of an entry, in a suit between M. and A., any bar to a subsequent action of R., by A., his guardian and next friend, against M., involving the validity of the same entry.[8] The foreclosure of a

[1] Boyd *v.* Baynham, 5 Humph. 386; 42 Am. Dec. 438.

[2] Pothier on Obligations, pt. 4, c. 3, sec. 3, art. 4.

[3] 2 Smith's Lead. Cas. 589; Brooking *v.* Dearmond, 27 Ga. 58; Robinson's Case, 5 Rep. 32 b; Benz *v.* Hines, 3 Kan. 397; 89 Am. Dec. 594; Com. Dig., tit. Estoppel, C; Lander *v.* Arno, 65 Me. 26; Erwin *v.* Garner, 108 Ind. 488; Rathbone *v.* Hooney, 58 N. Y. 463; McBurnie *v.* Seaton, 111 Ind. 56; McNutt *v.* Frogdon, 29 W. Va. 469.

[4] Pothier on Obligations, pt. 4, c. 3, sec. 3, art. 4.

[5] 2 Phillipps on Evidence, 11, 12.

[6] Blakey *v.* Newby, 6 Munf. 64.

[7] Jones *v.* Blake, 2 Hill, 629.

[8] Marshall *v.* Rough, 2 Bibb, 628.

mortgage by an action to which a widow is made a party in her character of executrix and devisee does not affect her claim for dower in the mortgaged premises;[1] neither does a foreclosure against herself and other heirs of the mortgagee (she not having joined in the mortgage), no reference being made in the petition to her right to dower.[2] In Missouri, a widow is not estopped from claiming lands in her own right by the fact that dower had been allotted to her in the same land,[3] nor by the fact that she was made a party to a suit for partition of the lands and for the assignment of her dower therein, which suit was prosecuted to judgment, and a decree entered therein assigning her dower and ordering the land to be sold.[4] These decisions, however, seem to be based upon the idea that a widow can always be relieved from a judgment made against her when she was ignorant of her true rights, rather than upon the theory that her claims in the different proceedings were by different rights and in different capacities. A suit by the president of the orphans' court, for the use of the assignee of the husband, for the amount of the share of the wife is no bar to a recovery in the name of the same officer for the use of the wife and her husband as her trustee.[5] A judgment against plaintiff, suing as the assignor of a non-negotiable promissory note, without the privity of the assignee, after the assignment was made, and notice thereof given the debtor, is no bar to an action by the same assignor, for the use of his assignee, especially if there is reason to believe that the former action was prosecuted in fraud of the rights of the assignee.[6] The following are instances of judgments against a party in one capacity not binding on him in another: A father suing as administrator of his minor son to recover for injuries sustained by such son

[1] Lewis *v.* Smith, 11 Barb. 152; Frost *v.* Koon, 30 N. Y. 428.

[2] Moomey *v.* Maas, 22 Iowa, 380; 92 Am. Dec. 395. See Benjamin *v.* Elmira R. R. Co., 49 Barb. 441, which contains expressions *contra*.

[3] Thompson *v.* Renoe, 12 Mo. 157.

[4] Crenshaw *v.* Creek, 52 Mo. 101.

[5] Eshelman *v.* Shuman, 13 Pa. St. 561.

[6] Dawson *v.* Coles, 16 Johns. 51.

is not affected by a judgment previously recovered by the father for his damages resulting from the same injuries;[1] a judgment against one as an administrator in one state cannot affect him in another;[2] judgment against a minor daughter in an action brought by her father as her next friend, for her seduction, is no bar to subsequent action by the father in his own right to recover for the same seduction;[3] sheriff suing by virtue of a levy under a writ in favor of A is not bound by a judgment recovered when he was suing under a levy in favor of B;[4] an action against parties as heirs does not affect them as tenants;[5] nor can an action against one personally affect the interest of a minor of whom he was guardian.[6]

Sometimes one of the parties is before the court in two or more capacities, and the judgment binds him in both. Thus if one is brought before the court as the trustee of certain bond-holders, and, as such, a decree is entered against him, he cannot relitigate the same matter on the ground that he was himself a holder of some of the bonds. If he was such holder, he is bound by the former decree, because as trustee in the former suit "he was representing himself."[7] Where a party against whom a judgment is offered in evidence was plaintiff in the former action, and there set forth the right in which he sued, there can be no difficulty in determining whether or not he is barred by such judgment, as there can be no doubt, if the cause of action by which he seeks to recover in the second suit is different from that which he alleged in the first, that the former judgment is inadmissible in the present action. Where a party has rights or claims property in two or more capacities, and is made a defendant in some action or proceeding, the pleading against him should show that he is made defendant in each capacity,[8] and failing to do so, the judgment will often bind him in

[1] Bradley *v.* Andrews, 51 Vt. 525.
[2] Coates *v.* Mackey, 56 Md. 416.
[3] Bartlett *v.* Kochel, 88 Ind. 425; McBurnie *v.* Seaton, 111 Ind. 56.
[4] Stoops *v.* Woods, 45 Cal. 439.
[5] Barrett *v.* Choen, 119 Ind. 56.
[6] Salter *v.* Salter, 80 Ga. 178; 12 Am. St. Rep. 249.
[7] Corcoron *v.* Chesapeake Canal Co., 94 U. S. 741.
[8] Manigault *v.* Holmes, 1 Bail. Eq. 283.

one capacity only, though he might have been bound in both by appropriate pleadings. Thus one who is a party, in his capacity as heir, to a proceeding by an administrator for the sale of lands is not precluded from afterwards enforcing a lien held by him as vendor.[1] If one is made a defendant in an official capacity, the judgment will not bind him personally, and if made a defendant personally, it will not bind him officially. Hence a judgment foreclosing a mortgage in an action against an executrix cannot prevent her from showing that she has a homestead in the property not subject to the mortgage, though in the former action she pleaded the homestead in her capacity of executrix;[2] and a judgment in an action against one, in which the capacity in which he is sued is not shown, does not affect title held by him as assignee in insolvency.[3] If a woman is a party to an attachment proceeding, and by a general bill all the attachment suits are brought into chancery and a particular lot directed to be sold, and no issue respecting the title to it is made up, she is not estopped from showing that the lot belonged to her, and not to the defendant in attachment.[4] If a married woman executes a mortgage in which her husband does not join, and he is made a party in a suit to foreclose it, in which judgment of foreclosure is subsequently rendered, it will not estop him from asserting that the property mortgaged did not belong to his wife as her separate estate, but, on the contrary, was community property.[5] But where an executor, being interested also as a creditor and surety of his testator, filed a bill in equity, praying that certain lands claimed under a deed of gift from the testator be subjected to the payment of his debts, and also praying for directions as to the execution of his trust, it was held that the decree disposing of such bill bound the executor in all the capacities in which he was interested.[6]

[1] Lord *v.* Wilcox, 99 Ind. 491.

[2] Stockton B. & L. Ass'n *v.* Chalmers, 75 Cal. 332; 7 Am. St. Rep. 173.

[3] Landon *v.* Townshend, 112 N. Y. 93; 8 Am. St. Rep. 712.

[4] Lorance *v.* Platt, 67 Miss. 183.

[5] McComb *v.* Spangler, 71 Cal. 418.

[6] Jenkins *v.* Nolan, 79 Ga. 295.

§ 157. **Numerous Parties.** — The general rule that no person can be treated as a *party* to a judgment who was not also a party to the action is subject to some exceptions. If a suit is brought by A, for himself and others not named, alleging that they are a large number of persons interested under a deed with himself as purchasers for a valuable consideration, and that they are so numerous that it is impracticable to bring them all before the court, the decree subsequently rendered in the suit can be used for the benefit of any of the unnamed parties.[1] An insolvent partnership made an assignment of its effects for the benefit of creditors. One of these creditors brought an action in his own behalf and that of others who should come in and claim the benefit thereof, against the assignees for an accounting and distribution of the funds in their hands. In this action a referee was appointed, with power to take and state the account of the assignees, and to report the amount due such creditors as should come in under the order and seek the benefit of the action. Notice to the creditors was given by a publication made by authority of the court, and requesting them to come in and exhibit their demands. In pursuance of such notice, creditors came in and exhibited their demands, an account was taken with the assignees, the referee's report was confirmed by the court, and the funds in the hands of the assignees were distributed accordingly. These proceedings were said to "have been sanctioned as indispensable to the distribution of trust funds and the settlement of trust estates in courts of equity"; and the decree of distribution was held to be binding upon all the creditors of the assignors, whether they knew of the proceedings or not, "just as if they had been parties to it, and their claim had been denied and defeated, unless they can assail or attack it for fraud, and claim its absolute nullity as to them on that account."[2] A trust com-

[1] Hurlbutt *v.* Butenop, 27 Cal. 50; Carpenter *v.* Canal Co., 35 Ohio St. 307.

[2] Kerr *v.* Blodgett, 48 N. Y. 66. See also Thompson *v.* Brown, 4 Johns. Ch. 619; Wilder *v.* Keeler, 3 Paige, 164;

pany having been proceeded against as an insolvent corporation, at the instance of a public officer, a receiver was appointed, who was ordered to take possession of the property of the company and administer it according to the law, subject to the further order and direction of the court. He took possession of the property and began to administer it, and for the purpose of obtaining the direction of the court in respect to such administration, he presented a petition alleging that all the creditors of the company had been ordered to present and prove their claims; that the larger number of them had complied with the order; that he had reason to believe that the rest of them would do so; that some of the creditors claimed preference, while others did not, and insisted that no preference be allowed; and he prayed for an order prescribing in what manner payment and distribution should be made of the funds realized by him as such receiver. Notice of the hearing of his petition was given to all persons interested, by the publication of the petition and the order of notice for three successive weeks in a newspaper, and service of such petition was also accepted by the chairman of the depositors' committee. At the hearing, counsel appeared and represented the general creditors, and other counsel for the creditors who claimed a preference, and a decree was entered that all the depositors who had proved or should thereafter prove their claims should stand upon terms of perfect equality. Some of the depositors who claimed a preference appealed from this decree, but the judgment was affirmed by the appellate court. Afterwards, other depositors appeared and claimed a preference notwithstanding the former decree, and insisted that they were not bound by it, because not parties thereto and not represented in any of the proceedings at or preceding the entry of such decree. The court, in

23 Am. Dec. 781; Egberts *v.* Wood, 3 Paige, 518; 24 Am. Dec. 236; Brooks *v.* Gibbons, 4 Paige, 374; McKenzie *v.* L'Amoureux, 11 Barb. 516; Dewey *v.* St. Albans T. Co., 60 Vt. 1; 6 Am. St. Rep. 84.

affirming the binding obligation of the decree as against all the depositors, whether represented or not, said: "Although the general rule in equity is, that all persons having an interest in the subject-matter in litigation should be before the court, to the end that complete justice may be done and future litigation prevented, yet there is of necessity an exception to this rule when a failure of justice would ensue from its enforcement. It is said that the want of parties does not affect the jurisdiction, but addresses itself to the policy of the court; that the rule was made by the court for the promotion of justice, and may be modified by it for the same purpose, and is always more or less a matter of discretion, depending on convenience: *Stimson* v. *Lewis*, 36 Vt. 91. Cases in which the parties in interest are so numerous as to make it impracticable or greatly inconvenient and expensive to bring them all before the court form an exception to the rule. And this exception applies to defendants as well as to plaintiffs. Take the case of a voluntary association of many persons. It is sufficient in a suit against them that such a number be made defendants as will fairly represent the interests of all standing in like character and responsibility."[1] While it is a general rule that *cestuis que trust* must be made parties, to bar their equitable interests, it is well settled that they need not be, if very numerous.[2] Where real estate was vested in trustees, for the use of two hundred and fifty subscribers, it was held to be unnecessary to make others than the trustees parties to the foreclosure of a mortgage.[3] A similar decision was made, where the trustee for the holder of three hundred and twenty railroad bonds was sued for the purpose of foreclosing a prior mortgage.[4] But it seems to be certain that the courts dislike to proceed in the absence of

[1] Dewey *v.* St. Albans T. Co., 60 Vt. 1; 6 Am. St. Rep. 84.

[2] Shaw *v.* R. R. Co., 5 Gray, 170; Wilink *v.* Canal Co., 4 N. J. Eq. 377; N. J. Franklinite Co. *v.* Ames, 1 Beas. 507.

[3] Van Vechten *v.* Terry, 2 Johns. Ch. 197.

[4] Board of S. *v.* M. P. R. R. Co., 24 Wis. 127.

any of the parties in interest, and that they will only fail to order all parties to be brought before them in extreme cases, where the difficulty of proceeding would otherwise be very great.[1]

§ 158. **Adversary Parties.** — Parties to a judgment are not bound by it, in a subsequent controversy between each other, unless they were adversary parties in the original action.[2] If A recovers judgment against B and C upon a contract, which judgment is paid by B, the liability of C to B, in a subsequent action for contribution, is still an open question, because as to it no issue was made or tried in the former suit.[3] As between the several defendants therein, a joint judgment establishes nothing but their joint liability to the plaintiff. Which of the defendants should pay the entire debt, or what proportion each should pay, in case each is partly liable, is still unadjudicated;[4] but a judgment against two joint debtors prevents either, in a suit with the other, from denying the existence and obligation of the debt, though he may still prove, by any competent evidence in his power, that the *whole* burden of the obligation should be borne by the other.[5] One of several plaintiffs is not prevented, by a judgment, from showing, when called upon by his co-plaintiffs to contribute his proportion of the expenses incurred, that he had no knowledge of the institution of the suit.[6] It is the constant practice of courts of equity to decree between co-defendants upon proper proofs, and under pleadings between plaintiffs and defendants, which bring the respective claims and rights of such co-defendants between themselves under judicial cognizance. But the language of a decree in chancery must be construed in reference to

[1] Doody *v.* Higgins, 9 Hare, 32.

[2] McMahan *v.* Geiger, 73 Mo. 145; 39 Am. Rep. 489; Dent *v.* King, 1 Ga. 200; 44 Am. Dec. 638; Harvey *v.* Osborn, 55 Ind. 535; Montgomery *v.* Road, 34 Kan. 122; Walters *v.* Wood, 61 Iowa, 290; Rice *v.* Cutler, 17 Wis. 351; 84 Am. Dec. 747.

[3] Buffington *v.* Cook, 35 Ala. 312; 73 Am. Dec. 491; McCrory *v.* Parks, 18 Ohio St. 1.

[4] Adm'r of Cox *v.* Hill, 3 Ohio, 412; Duncan *v.* Holcomb, 26 Ind. 378.

[5] Lloyd *v.* Barr, 11 Pa. St. 41.

[6] Wilson *v.* Mower, 5 Mass. 407.

the issue which is put forward by the prayer for relief and other pleadings, and which these show it was meant to decide. Hence though the language of the decree be very broad and emphatic,—enough so, perhaps, when taken in the abstract merely, to include the decision of questions between co-defendants,—yet where the pleadings, including the prayer for relief, are not framed in such a way as to bring their rights before the court, or are framed with a view to litigate the rights of defendant and plaintiff between each other only, such general language will be held to apply between plaintiff and defendant only, and not between co-defendants.[1] A decree on a bill in equity, filed by the executor of a will, against the residuary legatees, to determine their distributive shares, fixing the amount of the advancement to a legatee and the amount of his distributive share, is conclusive evidence of such amount in a suit for partition of real estate devised to the legatees by the same will.[2] In cases like this it is evident that the several persons joined as defendants are adversary parties. The only issues framed in the case are in respect to their relative claims under the same instrument. The plaintiff, though nominally a party, is indifferent to the result. As the entire contest must be made by defendants against each other, their position is such as to make the decree conclusive upon them whenever the same questions shall again be involved. Wherever the rules of practice permit defendants to make issues among themselves, and to have such issues determined and relief granted thereupon, they become adversary parties upon interposing pleadings setting forth their conflicting interests and calling for the granting of appropriate relief; and a judgment or decree determining such interests and granting or denying such relief is as conclusive upon

[1] Graham *v.* R. R. Co., 3 Wall. 704; Gardner *v.* Raisbeck, 28 N. J. Eq. 71. And a decree in a foreclosure suit, purporting to settle the rights of co-defendants, not there in issue, is to that extent void: Jones *v.* Vert, 121 Ind. 140; 16 Am. St. Rep. 379.

[2] Torrey *v.* Pond, 102 Mass. 355.

them as if they had been plaintiff and defendant instead of co-defendants.[1]

§ 159. **Parties must be Mutually Bound.** — No party is, as a general rule, bound in a subsequent proceeding by a judgment, unless the adverse party now seeking to secure the benefit of the former adjudication would have been prejudiced by it if it had been determined the other way.[2] "The operation of estoppels must be mutual. Both the litigants must be alike concluded, or the proceedings cannot be set up as conclusive upon either."[3] "It is essential to an estoppel that it be mutual, so that the same parties or privies may both be bound and take advantage of it."[4] "Nobody can take benefit by a verdict, that had not been prejudiced by it had it gone contrary."[5] A verdict and judgment in favor of a trespasser is not conclusive evidence in favor of a co-trespasser, in an action by the same plaintiff.[6] A judgment against the indorser is not evidence for him in an action against the maker.[7] A judgment against the tenant, in a writ of entry brought by an heir, at the expense of the co-heirs, to try title, cannot be taken advantage of by another of the heirs, in a suit against the tenants for mesne profits.[8] A party to a divorce suit, in which the bill was dismissed, cannot use the decree of dismissal, or any of the findings of the court

[1] Harmon *v.* Auditor, 123 Ill. 122; 5 Am. St. Rep. 502; Devin *v.* Ottumwa, 53 Iowa, 461; Leavitt *v.* Wolcott, 95 N. Y. 212; Goldschmidt *v.* County of Nobles, 37 Minn. 49; Parkhurst *v.* Berdell, 110 N. Y. 386; 6 Am. St. Rep. 384.

[2] Redmond *v.* Coffin, 2 Dev. Eq. 443; Wood *v.* Davis, 7 Cranch, 271; Simpson *v.* Jones, 2 Sneed, 36; Bell *v.* Wilson, 52 Ark. 173; Nowack *v.* Knight, 44 Minn. 241; Densmore *v.* Tomer, 14 Neb. 392; Lord *v.* Locke, 62 N. H. 566; Henry *v.* Woods, 77 Mo. 277; Cothren *v.* Olmsted, 57 Conn. 329; Geekie *v.* Kirby C. Co., 106 U. S. 379; Burdick *v.* Norwich, 49 Conn. 225; Shulze's Appeal, 1 Pa. St. 251; 44 Am. Dec. 126; Furgeson *v.* Jones, 17 Or. 204.

[3] 1 Greenl. Ev., sec. 524; Manigault *v.* Deas, 1 Bail. Eq. 283; Burgess *v.* Lane, 3 Greenl. 165; Griswold *v.* Jackson, 2 Edw. Ch. 461; Simpson *v.* Pearson, 31 Ind. 1; 99 Am. Dec. 577; Huntington *v.* Jewett, 25 Iowa, 249; 95 Am. Dec. 788; Bradford *v.* Bradford, 5 Conn. 127; Edwards *v.* McCurdy, 13 Ill. 496; Harris *v.* Plant & Co., 21 Ala. 639; Wright *v.* Hazen, 24 Vt. 143.

[4] Petrie *v.* Nuttall, 11 Ex. 569.

[5] Gilbert on Evidence, 28; cited in Wenman *v.* MacKenzie, 5 El. & B. 447.

[6] Sprague *v.* Oakes, 19 Pick. 455.

[7] Fenn *v.* Dugdale, 31 Mo. 580; Brooklyn *v.* Bank of Republic, 11 Cent. L. J. 330.

[8] Allen *v.* Carter, 8 Pick. 175.

or jury, in a controversy between himself and a third party, for the purpose of establishing any of the facts asserted by such decree or finding. Thus if, in an application by a husband for divorce, on the ground of adultery, the jury find the allegations of plaintiff to be true, and also find that he has been guilty of a similar offense, and his bill is on that account dismissed, he cannot, on being sued for necessaries furnished his wife, defend himself by the finding of the jury in respect to her adultery.[1] Neither is the dismissal of a bill of a wife for divorce, on the ground of extreme cruelty, conclusive evidence, in an action by a third person against the husband for necessaries, that the wife left him without sufficient justification.[2] A judgment in favor of one creditor, declaring a conveyance void as against creditors, is not evidence in a suit by another creditor, for he would not have been concluded if the first suit had terminated differently.[3] A conviction upon an indictment is not usually admissible as evidence in any civil action, because the parties in the civil suit are not generally parties to, nor mutually bound by, the criminal prosecution. But if a bond is given to the state that a party will abstain from committing some unlawful act, a subsequent indictment of the principal, and his conviction thereunder, are, in a civil suit by the state on the bond, conclusive evidence against the principal and *prima facie* evidence against the surety.[4]

Notwithstanding the self-evident justice and propriety of the rule that estoppels must be mutual, and that no man shall bind another by an adjudication which he is himself at liberty to disregard, instances are not rare where the rule has been denied or overlooked by courts and judges whose decisions are entitled to great respect. Lord Kenyon admitted the record of a former action, in which the defendants in the suit before him were adversary parties, but

[1] Needham *v.* Brenner, 12 Jur., N. S., 434; 14 Week. Rep. 694.
[2] Burlen *v.* Shannon, 3 Gray, 387.
[3] Winston *v.* Starke, 12 Gratt. 317.
[4] Webbs *v.* State, 4 Cold. 199.

with which the plaintiff was in no way connected, for the purpose of proving that the defendants were partners. His lordship justified his ruling, on the ground that one of the defendants, who had denied the partnership in both actions, had a full opportunity to sustain his denial in the former action, by every means of proof which he could now employ.[1] In a case in New York, one of two heirs or devisees having brought an action against an executor, and obtained a decree establishing the interests of both, the court held that though the other heir or devisee might, if he thought proper, set up claims at variance with the decree, yet if he elected to claim the benefit of it, all its adjudications of rights and all its settlement of principles were conclusive in his favor against the executor.[2] Recently, it has been held, in Maine, that a written verdict of a jury finding a person to be the original promisor of a note instead of the indorser, as he claimed to be, is conclusive against him in a litigation with *any other party to the note*.[3] In the circuit court of the United States a decision was made to the effect that a defendant who, after making his defense, is compelled by the court to pay a sum of money to plaintiff, belonging to another, will be protected from a suit by the rightful owner,[4] because, — 1. The equities are equal, it being no greater a hardship for one man to lose his property, than for another to pay a debt twice; 2. That the *lis pendens* of the former suit, being notice to the whole world, the rightful owner was negligent in not making his title known; 3. The right of the true owner to recover his property remains unchanged, but the person of whom he should recover it is he into whose possession it has passed by direction of a competent judicial tribunal, and from whom a recovery could be had, as in the cases of *Le Chevalier* v. *Lynch*, Doug. 170, and *Phillips* v. *Hunter*, 2 H. Black. 402.

[1] Whately *v.* Menheim, 2 Esp. 608.
[2] O'Brien *v.* Heeney, 2 Edw. Ch. 246.
[3] Sturtevant *v.* Randall, 53 Me. 149.
[4] Mayer *v.* Foulkrod, 4 Wash. C. C. 503.

A husband and wife having, in an action between them, litigated the right to moneys which she had drawn from a bank, the judgment in her favor was held to be conclusive evidence against the husband in favor of the bank, in an action brought by him against it to recover the same moneys.[1] The fact that a party relying upon a judgment as a conclusive adjudication in his favor was not named in the record of the former action is not conclusive against him.

There are various circumstances, as we shall hereafter show, in which a party not named in an action may be bound by the judgment therein; and as a general rule, where he would have been bound had the decision been against his interests, he is entitled to the benefit of the judgment if it results in his favor. But it has been held that before he can invoke the protection of this rule he must show that he participated in the former action for the defense of his own interests, and with the knowledge of the adverse litigant therein.[2]

§ 160. **Suit not Including All Former Parties.** — A diversity of opinion exists in reference to the effect of a judgment or decree, in a subsequent action, in which some, but not all, of the adversary parties to such judgment or decree are litigants. Parke, B., in the course of the argument before him in *Christy* v. *Tancred*, 9 Mees. & W. 438, said: "There is no authority that a judgment against A and B jointly is evidence in an action against A alone, because it may have proceeded on an admission of B, which might or might not be evidence against A, according to circumstances." On the other hand, it is stated, with the utmost confidence, that a judgment in the case of *A* v. *B and C* will be allowed to be set up as an estoppel in a suit between A and B, and that this furnishes an exception to the general rule that the judgment must

[1] Glaze *v.* Citizens' N. B., 116 Ind. 492.

[2] Cannon R. Mfg. Ass'n *v.* Rogers, 42 Minn. 123; 18 Am. St. Rep. 497.

have been between the same parties.[1] This exception seems to be consistent with the general rule. It violates none of the principles usually applied to estoppels; but, on the contrary, is supported by those principles and the considerations of public policy on which they are based. The former adjudication ought not to be any less conclusive on the adverse parties, A and B, because other persons shared with them the advantages and disadvantages of the former suit. The matter could have been as efficiently litigated as though A and B were the sole parties in interest; and the opportunity for the settlement of their controversy having been so given, there is no reason why it should be reopened.

§ 161. **Between Additional Parties.** — A difference of opinion is also manifest in relation to the effect of a judgment in a subsequent action in which other persons as well as the parties to the judgment are litigants. According to the opinion given in 2 Smith's Leading Cases, 683, "a judgment against a co-contractor, co-obligor, or co-partner will not be evidence, where another is joined." This seems, in most cases, to be perfectly reasonable; otherwise the party now joined will either be benefited by a decision which could not have prejudiced him if it had gone the other way, or bound by an adjudication which he had no opportunity to resist. If, however, in the second action there are additional nominal parties having no interests to be affected by it, their presence will not prevent the former judgment from operating as an estoppel.[2] It has been held that a judgment in favor of A is admissible evidence in a subsequent controversy involving the same questions, and in which A and B are plaintiffs, though B, then being disinterested, was a witness at the

[1] Lawrence *v.* Hunt, 10 Wend. 80; 25 Am. Dec. 539; Ehle *v.* Bingham, 7 Barb. 494; Dows *v.* McMichael, 6 Paige, 139; Thompson *v.* Roberts, 24 How. 233; Davenport *v.* Barnett, 51 Ind. 329; Girardin *v.* Dean, 49 Tex. 243; Larum *v.* Wilmer, 35 Iowa, 244; Russell *v.* Farquhar, 55 Tex. 355; Wilson *v.* Buell, 117 Ind. 315.

[2] Hanna *v.* Read, 102 Ill. 596; 40 Am. Rep. 608.

former trial.[1] If an action is brought against a portion of several joint promisors, and they, waiving the non-joinder of the others, proceed to trial, and recover on the merits, the judgment is admissible in favor of the defendants in a future action against *all* the promisors on the same promise.[2] In this instance it happens that persons not bound by a former suit are entitled to avail themselves of its benefits, because their liability cannot, against their objection, continue after that of their co-contractors has ceased, and because the defendants in the former suit must either be deprived of the fruits of their litigation, or those fruits must also be given to persons who were not parties to the suit. Besides, if the plaintiff established his cause of action against the joint promisors sued, he could not, under the operation of the law of merger, recover against any other of the promisors. To deny the effect of the judgment as an estoppel in a future action against all the promisors would place him in a better position than if the judgment had been in *his favor*. For the reason that a joint debt cannot be severed, it may happen that a party is not prejudiced by a judgment by which he would otherwise be bound. Thus where, in an action against A, a town, being summoned as trustee, answered that it owed A and B, and judgment was thereupon entered up against it for the amount, it was held this judgment cannot defeat a subsequent action by A and B for the same amount.[3]

### Part II. — Of Privies.

§ 162. **Privies.** — "Where one claims in privity with another, whether by blood, estate, or law, he is in the same situation with such person as to any judgment for or against him; for judgments bind privies as well as parties."[4] "The term 'privity' denotes mutual or successive

[1] Blakemore *v.* Canal Co., 2 Cromp. M. & R. 133.
[2] French *v.* Neal, 24 Pick. 55.
[3] Hawes *v.* Waltham, 18 Pick. 451.
[4] Woods *v.* Montevallo C. & T. Co., 84 Ala. 560; 5 Am. St. Rep. 393.

relationship to the same rights of property."[1] This relationship is produced either by operation of law, by descent, or by voluntary or involuntary transfers from one person to another. Hence privies have, from an early period in the history of the common law, been classified as, —

Privies in law, as lords by escheat, tenant by curtesy, tenant in dower, executor or administrator, the incumbent of a benefice, and all others that come in by act of the law;

Privies in blood, as heirs and coparceners;

Privies in estate, as where there is a mutual or successive relationship to rights of property not occasioned by descent nor by act of law.[2]

Neither this nor any other classification of privies is of any considerable importance in considering the operation of judgments. All privies are in effect, if not in name, *privies in estate.* They are bound because they have succeeded to some estate or interest which was bound in the hands of its former owner; and the extent of the estoppel, so far as the privy is concerned, is limited to controversies affecting this estate or interest. The manner in which the estate was lawfully acquired neither limits nor extends the operation of the estoppel created by a former adjudication, and is therefore immaterial. It is well understood, though not usually stated in express terms in works upon the subject, that no one is privy to a judgment whose succession to the rights of property thereby affected occurred previously to the institution of the suit. A tenant in possession prior to the commencement of an action of ejectment cannot therefore be lawfully dispossessed by the judgment, unless made a party to the suit.[3] The assignee of a note is not affected by

[1] Greenl. Ev., sec. 189. A privy is one holding under a party litigant and deriving title subsequent to the commencement of the suit: Hunt *v.* Haven, 52 N. H. 162.

[2] 2 Co. Lit. 352 b; 2 Phillipps on Evidence, 13, 14. Mr. Greenleaf adds the class privies by representation, in which he includes executors and administrators.

[3] Sampson *v.* Ohleyer, 22 Cal. 200; Ex parte Reynolds, 1 Caines, 500; Goerges *v.* Hufschmidt, 44 Mo. 179; Garrison *v.* Savignac, 25 Mo. 47; 69 Am. Dec. 448.

any litigation in reference to it beginning after the assignment.[1] No grantee can be bound by any judgment in an action commenced against his grantor subsequent to the grant; otherwise a man having no interest in property could defeat the estate of the true owner.[2] Nor will the fact that a grantee's conveyance is not recorded bind him by a judgment against his grantor, in an action commenced after the execution of the grant, unless the statute expressly gives the judgment that effect.[3] The foreclosure of a mortgage, or of any other lien, is wholly inoperative upon the rights of any person not a party to the suit, whether such person is a grantee,[4] judgment creditor,[5] attachment creditor,[6] or other lien-holder.[7] A judgment of freedom in favor of a woman does not establish the *status* of her children previously born. The right of property in the children, if vested in some person at their birth, could not be divested by any proceeding to which he was not a party.[8] It is essential to privity, as the term is here used, that one person should have succeeded to an estate or interest formerly held by another. He who has so succeeded is in privity with him from whom he succeeded, and all the estate or interest which he has acquired is bound by judgment recovered against his predecessor while he held such estate or interest.[9] On the other hand, except to the extent which one person has succeeded to an estate or interest formerly held by another, there can be no privity between them, no matter

[1] Powers *v.* Heath's Adm'r, 20 Mo. 319.

[2] Winslow *v.* Grindal, 2 Greenl. 64; Marshall *v.* Croom, 60 Ala. 121; Cook *v.* Parham, 63 Ala. 456; Hume *v.* Franzen, 73 Iowa, 25; Coles *v.* Allen, 64 Ala., 98; Bartero *v.* Real E. S. B., 10 Mo. App. 76.

[3] Vose *v.* Morton, 4 Cush. 27; 50 Am. Dec. 750; Windom *v.* Schuppel, 39 Minn. 36.

[4] Brush *v.* Fowler, 36 Ill. 58; 85 Am. Dec. 382.

[5] Brainard *v.* Cooper, 10 N. Y. 356.

[6] Lyon *v.* Sanford, 5 Conn. 544.

[7] Smith *v.* Claimants, 4 Nev. 254; 97 Am. Dec. 531.

[8] Bloodgood *v.* Grasey, 31 Ala. 575; Davis *v.* Wood, 7 Cranch, 271.

[9] Webster *v.* Mann, 56 Tex. 119; 42 Am. Rep. 688; Soward *v.* Coppage, 9 S. W. Rep 389 (Sup. Ct. Ky.); Stoutmore *v.* Clark, 70 Mo. 471; Adams Co. *v.* Graves, 75 Iowa, 642; Hair *v.* Wood, 58 Tex. 77; Winston *v.* Westfeldt, 22 Ala. 760; 58 Am. Dec. 278; Lipscomb *v.* Postell, 38 Miss. 476; 77 Am. Dec. 651; Shattuck *v.* Bascom, 105 N. Y. 39; Pray *v.* Hegeman, 98 N. Y. 351.

what were or are their relations to each other or to the same piece of property. Therefore while a mortgagee is in privity with a mortgagor as to all that happened before the execution of the mortgage, he is not in privity with respect to anything happening afterwards.[1] The fact that parties are jointly liable, or are joint owners of property, or are otherwise associated in business, does not place them in privity with each other, except in so far as one may have succeeded to the interest of the other. Hence there is no privity between the maker, indorser, and acceptor of a note,[2] nor between the surviving member of a partnership and the heirs of a deceased partner.[3] Kinship, whether by affinity or consanguinity, does not create privity, except where it results in the descent of an estate from one to another. Therefore there is no privity between husband and wife, or parent and child, or other relatives, when neither of them has succeeded to an estate or interest in property formerly held by the other.

§ 163. **Administrators and Executors.** — A judgment against an administrator is binding on the creditors and legatees of the estate.[4] If in an action by an administrator against the widow for property claimed as assets of the estate she recover, the judgment in her favor is, in the absence of fraud, conclusive on the creditors.[5] A decree against an executor is binding on an administrator *de bonis non*,[6] according to some of the authorities; but the preponderance of the decisions on the subject is to the effect that there is no privity between an executor or administrator and an administrator *de bonis non*, and that

[1] Cook *v.* Parham, 63 Ala. 456; Shattuck *v.* Bascom, 105 N. Y. 39.

[2] Jordan *v.* Ford, 7 Ark. 416; Crabb *v.* Larkin, 9 Bush, 154; Wells *v.* Coyle, 20 La. Ann. 396; Fenn *v.* Dugdale, 31 Mo. 580; Leslie *v.* Bonte, 22 N. E. Rep. 594 (Ill.).

[3] Trustees *v.* Laurence, 11 Paige, 80; Sturges *v.* Beach, 1 Conn. 507; Moore's Appeals, 34 Pa. St. 411; Buckingham *v.* Ludlum, 37 N. J. Eq. 137.

[4] Moulding *v.* Gossett, 15 S. C. 565; Redmond *v.* Coffin, 2 Dev. Eq. 437; Hooper *v.* Hooper, 32 W. Va. 526; Bell *v.* Bell, 25 S. C. 149; Stone *v.* Wood, 16 Ill. 177; Castellaw *v.* Guilmartin, 54 Ga. 299; but a judgment in an action between the administrator and heirs does not bind the legatees not parties: Valsain *v.* Cloutier, 3 La. 170; 22 Am. Dec. 179; Shepman *v.* Rollins, 98 N. Y. 311.

[5] Pickens *v.* Yarborough, 30 Ala. 408.

[6] Manigault *v.* Deas, 1 Bail. Eq. 283.

a judgment against one is not evidence against the other,[1] and that the recovery of judgment by an administrator is, after his death, no bar to an action by his successor.[2] If letters of administration are granted in different states to different persons, there is no privity between such administrators. A judgment obtained against one will furnish no cause of action against the other to affect assets in the hands of the latter.[3] And the converse of this proposition is true; for a judgment obtained by one of the administrators cannot be asserted as a cause of action by the other.[4] Where there is a will, and an executor thereof, or an administrator with the will annexed, in another jurisdiction, there is said to be privity between them. "Between executors of the same decedent in different jurisdictions there is a privity derived from or through the will of the testator, and a judgment or decree against either is evidence against the other, and may be enforced against each, and is sufficient to ground a suit or action against either executor. An administrator with the will annexed is, in legal contemplation, executor of the will, and a decree against a domiciliary executor binds every executor of the same will in every jurisdiction."[5] The authority cited in support of the language just quoted does not, however, support it, except to the extent of affirming that there is a privity between different executors of the same decedent, not existing between his different administrators. "Notwithstanding the privity that there is between executors to a testator, we do not think that a judgment obtained against one of several executors would be conclusive as to the demand against another executor, qualified

[1] Thomas *v.* Stearns, 33 Ala. 137; Rogers *v* Grannis, 20 Ala. 247; Wenrick *v.* McMurdo, 5 Rand. 51; Graves *v.* Flowers, 51 Ala. 402; 23 Am. Rep. 555; Martin *v.* Ellerbe, 70 Ala. 326; Alsop *v.* Mather, 8 Conn. 584; 21 Am. Dec. 703.

[2] Note 259 to Phillipps on Evidence, by C., H , & E.; Grout *v.* Chamberlain, 4 Mass. 611; Allen *v.* Irwin, 1 Serg. & R. 549; Barnehurst *v.* Yelverton, Yelv. 83.

[3] McLean *v.* Meek, 18 How. 16; Stacy *v.* Thrasher, 6 How. 44; Brodie *v.* Bickley, 2 Rawle, 431; Ela *v.* Edwards, 13 Allen, 48; 90 Am. Dec. 174; Merrill *v.* N. E. Ins. Co., 103 Mass. 245; 4 Am. Rep. 548; Jones *v.* Jones, 15 Tex. 463; 65 Am. Dec. 174.

[4] Story on Conflict of Laws, sec. 522; Rosenthal *v.* Renick, 44 Ill. 207.

[5] Garland *v.* Garland, 84 Va. 189.

in a different state from that in which the judgment was rendered. But such a judgment may be admissible in evidence against an executor in another jurisdiction, for the purpose of showing that the demand had been carried into judgment in another jurisdiction against one of the testator's executors, and that the others were precluded from pleading prescription or the statute of limitations upon the original cause of action."[1] Between the real and personal representatives of a deceased person there is no privity. Hence a judgment against an administrator or executor is never conclusive against the heirs or devisees,[2] and a judgment for or against an heir or devisee has no effect upon an administrator or executor.[3] A decree against an executor is not binding on the heir, "because he is not a party to the suit, cannot offer testimony, adduce evidence in opposition to the claim, nor appeal from the judgment."[4] The allowance of a claim against an estate by the administrator and the probate judge has the same effect as a judgment. But as the heirs are not bound by a judgment against the administrator, they are at liberty to dispute any claim so allowed, because the allowance has no higher effect than a judgment. If the allowed claims are made the basis on which to obtain an order to sell the real estate, the heirs are not precluded from contesting them as freely as though they had acquired none of the properties of a judgment; for as to the heirs, they are not yet *res judicata*.[5] When a judgment or *quasi* judgment has been recovered against an adminis-

[1] Hill *v.* Tucker, 13 How. 467.

[2] McCoy *v.* Nichols, 4 How. (Miss.) 31; Cowen, Hill, and Edwards's note 259 to Phillipps on Evidence; Vernon *v.* Valk, 2 Hill Eq. 257; Collinson *v.* Owens, 6 Gill & J. 4; Robertson *v.* Wright, 17 Gratt. 534; Early *v.* Garland, 13 Gratt. 1; Hudgin *v.* Hudgin, 6 Gratt. 320; 52 Am. Dec. 124; Birely's Ex'rs *v.* Staley, 5 Gill & J. 432; 25 Am. Dec. 303; Hardaway *v.* Drummond, 27 Ga. 221; 73 Am. Dec. 730; Ford *v.* Hennessey, 70 Mo. 580; Osgood *v.* Manhattan Co., 3 Cow. 612; 15 Am. Dec. 304; Teague *v.* Corbett, 57 Ala. 529; Starke *v.* Wilson, 65 Ala. 576; Sharp *v.* Freeman, 45 N. Y. 802, Swiggart *v.* Harber, 4 Scam. 364; 39 Am. Dec. 418.

[3] Dorr *v.* Stockdale, 19 Iowa, 269; Douglass *v.* McCarer, 80 Ind. 91.

[4] Garnett *v.* Macon, 6 Call, 308.

[5] Beckett *v.* Selover, 7 Cal. 215; 68 Am. Dec. 237; Estate of Hidden, 23 Cal. 362; Stone *v.* Wood, 16 Ill. 177.

trator or executor, and proceedings are taken to compel its payment by the sale of real estate, the majority of the authorities seem to treat it as *prima facie* evidence of the claim, and to require the heir to assume the burden of showing it to be unjust,[1] while the minority insist that it is not admissible against the heirs, and that those holding such judgment must establish their demand as though no prior recovery or allowance thereof had been had.[2] If the heir is also executor or administrator, he represents in his two capacities the interests of one and the same person, and has full opportunity, in a suit against himself as the personal representative, to protect his rights as successor to the realty. There is no reason why one so situated should have the right to be twice heard upon the same controversy; and a judgment against him as administrator, establishing a claim against the estate, should conclude him as heir.[3] The courts of West Virginia, however, regard the circumstance that the administrator is also the heir as accidental and immaterial, and deny that a judgment against him as administrator is evidence against him as heir.[4] Where a judgment against an administrator is not binding upon the heir, it cannot deprive him, when his interests are sought to be reached, of the benefit of the plea of the statute of limitations.[5]

One who suffers an administrator, who has no authority, to sue and to recover judgment for a debt due the estate, and then pays the judgment, cannot thereby defeat an action brought by an administrator having the right to sue.[6] A written agreement to convey lands is a covenant real. If broken in the lifetime of the covenantee, it passes

[1] Steele *v.* Liniberger, 59 Pa. St. 308; Staples *v.* Staples, 85 Va. 76, by statute of February 19, 1884; Sergeant's Heirs *v.* Ewing, 36 Pa. St. 156; Stone *v.* Wood, 16 Ill. 177; Rosenthal *v.* Renick, 41 Ill. 202; Garther *v.* Welch, 3 Gill & J. 259; Nichols *v.* Day, 32 N. H. 133; 64 Am. Dec. 358.

[2] Daingerfield *v.* Smith, 83 Va. 81; Brewes *v.* Lawson, 76 Va. 36; Merchants' Bank *v.* Good, 21 W. Va. 455; McKay *v.* McKay, 33 W. Va. 724; Board *v.* Callahan, 33 W. Va. 209.

[3] Boykin *v.* Cook, 61 Ala. 473; Stewart *v.* Montgomery, 23 Pa. St. 410.

[4] Merchants' Bank *v.* Good, 21 W. Va. 455.

[5] Saddler *v.* Kennedy, 26 W. Va. 636; James *v.* Commercial Bank, 78 Ky. 413.

[6] Pond *v.* Makepeace, 2 Met. 114.

to his personal representatives after his death, though he had commenced an action for its specific execution. The revival of the suit by the heirs, and their obtaining a decree in it for the performance of the agreement, in no wise affects the administrator. He may afterward recover damages for the breach of the contract to convey. In such a case there might be a decree in favor of the heirs for specific execution, saving the rights of the creditors; but the personal representative is an indispensable party, whose rights cannot be affected if he is omitted.[1] As there is no privity between the personal representative and the heir, the latter cannot have the advantage of an adjudication in favor of the former. Hence a perpetual injunction obtained by an executor to prevent R. from prosecuting any action for the recovery of the arrears of an annuity against such executor or other representative of the testator does not prohibit R. from prosecuting such action against the heirs.[2] Of course there is no privity between an executor and administrator, and one claiming to have acquired title from the decedent in his lifetime. Therefore a judgment in an action against an administrator, requiring him to include certain property in his inventory of the effects of his intestate, cannot estop persons who claim that such property was given to them by the decedent from maintaining their claim.[3]

§ 163 a. **Relation between Administrator and Heirs Modified by Statute.** — Section 1581 of the Code of Civil Procedure of California declares that the executor or administrator must take into his possession all the estate of the decedent, real and personal. Section 1582 of the same code states that "actions for the recovery of any property, real or personal, or for the possession thereof, and all actions founded upon contracts, may be maintained by or against executors and administrators, in all cases in which

[1] Combs *v.* Tarlton's Adm'r, 2 Dana, 454.

[2] Dale *v.* Rosevelt, 1 Paige, 35.

[3] Hill *v.* Stevenson, 63 Me. 364; 18 Am. Rep. 231.

the same might have been maintained by or against their respective testators or intestates." An action of ejectment having been brought by an administrator, and judgment having been rendered therein, the question arose as to the effect, under these statutory provisions, of this judgment upon the heirs of the deceased. The court held the judgment to be binding, for the following reasons: "The principle of law upon which the estoppel rests has reference to the fact that in the former action the hostile titles were directly opposed before the court rendering the former judgment, and that the superiority of the one over the other was ascertained and fixed by that judgment. That an administrator appearing in an action involving the interests of the estate represents as well the heirs as the creditors of the deceased, is well settled. But he represents not only the interest of heirs and creditors, but also the title which the deceased had at the time of his death. When, therefore, in an action of ejectment, an administrator, seeking to recover the real estate of his intestate, alleges upon the record the seisin of that intestate, he thereby tenders an issue directly upon the title to the premises; if issue be joined by the defendant upon this point, and judgment be rendered, it is necessarily an adjudication that *the title of the intestate* was or was not superior to the title set up by the defendant in the action." After proceeding further, to show that the issues in the action by the administrator are the same as the issues in any action subsequently brought by the heir relying upon title derived from his ancestor, the court concludes that "if upon an action brought by the administrator against a defendant in possession of real property, upon the allegation of seisin in the deceased at the time of his death, it be adjudged that the intestate was not seised, or that the defendant had the better title, the legal consequence follows that the administrator, the heirs and creditors, and all persons subsequently asserting title as having vested in themselves by reason of the death of the intestate, are

alike estopped to deny the superiority of the title of the defendant adjudicated in the former action."[1] Where the statute gives administrators rights not possessed by them at the common law, and in effect makes them the representatives of the estates of their intestates, and authorizes them to prosecute and defend actions, the courts have generally given to the judgments in such actions the same effect as if the heirs and all other parties in interest were nominal parties thereto,[2] and have therefore held that decrees foreclosing mortgages, to which only the administrator of the mortgagor was a party, divested the heirs of their estate.[3] In Ohio and North Carolina, judgments against administrators are, in proceedings to require the sale of real estate to pay debts, conclusive against the heirs, in the absence of fraud or collusion.[4]

§ 164. **Principal and Agent.** — Agents and principals do not, as such, have any mutual or successive relationship to rights of property. They are not in privity with each other.[5] If the principal is ever bound by a judgment against his agent, it is in those cases in which he authorized the institution of the suit, of which we shall treat in the latter part of this chapter. An action by and in the name of an agent, for trespass for taking coin from his possession and converting it, in which the jury found that the property belonged to the principal, and therefore gave the plaintiff nominal damages, is no bar to an action by and in the name of the principal, unless it can be shown that the former suit was brought under his direction and for his benefit.[6] A note, transferred by delivery, was by the transferee placed in the hands of an agent,

[1] Cunningham *v.* Ashley, 45 Cal. 485; Meeks *v.* Vassault, 3 Saw. 206; De la Ossa *v.* Oxarat, 58 Cal. 101.

[2] Conolly *v.* Conolly, 26 Minn. 350.

[3] Bayly *v.* Mueke, 65 Cal. 349; Merritt *v.* Daffin, 24 Fla. 320.

[4] Faran *v.* Robinson, 17 Ohio St. 242; 93 Am. Dec. 617; Proctor *v.* Proctor, 105 N. C. 222; Speer *v.* James, 94 N. C 417.

[5] Hayes *v.* Bickelhoupt, 24 Fed. Rep. 806. If an agent procures a judgment in favor of his principal by fraud, the latter, though personally innocent, cannot retain the fruits thereof: Webster *v.* Diamond, 36 Ark. 532.

[6] Pico *v.* Webster, 12 Cal. 140.

with orders to demand payment, and if necessary, to place it in the hands of an attorney for collection by suit. Payment not being made upon demand, the note was given to an attorney. He, on account of his ignorance of its ownership, sued in the name of the agent, and the suit was successfully defended on a plea of set-off against the plaintiff. The true owner, having no notice of this action, was permitted to afterward recover in his own name.[1]

§ 165. **Assignees and Alienees.** — A person who purchases property, real or personal, is entitled to the benefits and subjected to the disadvantages which, by the operation of final adjudications, had attached to the property in the hands of its former owner. A mortgagee, having commenced an action for the possession of the mortgaged premises, was opposed by the mortgagor's setting up the defense of usury. Failing in this defense, the mortgagor conveyed to a third person, who brought a writ of entry against the mortgagee, and sought to support his action by proof of the same usury which had been presented as a defense in a former suit. Whereupon it was held that the former judgment was an estoppel running with the land, and preventing the grantee of the mortgagor from prevailing in any action brought on the title acquired by his conveyance.[2] A verdict and judgment against a *feme sole* will be binding on her future husband, so far as he represents her person or succeeds to her estate.[3] On the other hand, the grantee of real estate, though a witness on the trial of the former cause, may assert the judgment in favor of his grantor in reference to the real estate, as an estoppel.[4] And a judgment against a claimant, upon

[1] Lawrence *v.* Ware, 37 Ala. 553. There may be instances of actions against agents for the possession of the property of their principals, in which the latter may be bound by the judgment by being given notice of the action and an opportunity to defend: Warfield *v.* Davis, 14 B. Mon. 40; McKinzie *v.* Railroad, 28 Md. 16.

[2] Adams *v.* Barnes, 17 Mass. 365.

[3] Hawkins *v.* Lambert, 18 B. Mon. 99.

[4] 2 Phillipps on Evidence, 15, 16.

the trial of the right of personal property levied under execution, is conclusive evidence against such claimant in a subsequent controversy between him and the purchaser at the execution sale.[1] If a judgment is rendered against the assignee of a note, who afterwards retransfers it to the original payee, the latter is bound by the judgment;[2] but if one is the payee of two notes made by the same maker, and arising out of the same transaction, and transfers one of them, and his assignee commences action thereon and is defeated, the judgment cannot affect an action by the payee on the other note.[3]

§ 166. **Bailors and Bailees.** — The bailor and bailee both have such an interest in the property as authorizes either to maintain an action for its injury or conversion. A judgment against a bailor, in an action in reference to the property, is a bar to any subsequent suit or defense by the bailee.[4] A recovery and satisfaction by *either* is a bar to any subsequent suit by the other; but a recovery and satisfaction in an action commenced by the bailee is said to be no defense to an *antecedent* action in the name of the bailor.[5] A bailee delivering goods to a third person, believing him to be the owner, may avail himself, in any action by the bailor, as an estoppel, of a judgment against the bailor, in an action wherein he sought to recover the same goods from the person to whom the bailee had delivered them.[6]

§ 167. **Garnishees.** — "Where one is by garnishment involuntarily made a party to a suit in which he has no personal interest, he is fully protected by the proceedings in law, provided he acts in obedience to the orders of the court in the surrender and payment of the property

[1] Shirley *v.* Fearne, 33 Miss. 653; 69 Am. Dec. 375.

[2] Leslie *v.* Bonte, 130 Ill. 498; Soward *v.* Coppage, 9 S. W. Rep. 389 (Ky.).

[3] Gerrish *v.* Bragg, 55 Vt. 329.

[4] Hughes *v.* Pipe Lines, 23 N. E. Rep. 1042; Green *v.* Clarke, 12 N. Y. 343.

[5] Steamboat *v.* McCraw, 31 Ala. 659.

[6] Burton *v.* Wilkinson, 18 Vt. 186; 46 Am. Dec. 145; Bates *v.* Stanton, 1 Duer, 79.

attached."[1] But a judgment against a garnishee is never conclusive against the principal that the amount for which the garnishee has been made liable is the full amount due from him; otherwise a garnishee, by confessing part of the debt, could avoid payment of the residue. He will in no case be protected by the judgment beyond the amount it required him to pay;[2] and this is the rule applied to judgments against a trustee.[3] But a judgment for or against a garnishee, in an attachment issued in favor of one creditor, is not binding on any other attaching creditor. Between the two creditors there is no privity.[4] After a suit is begun, and a person is summoned as the trustee of the defendant, the plaintiff has the right to litigate the question of the trustee's indebtedness, unless some litigation has been previously pending in reference thereto. Therefore a judgment in favor of the trustee, in an action between him and the defendant, is not evidence against plaintiff to prove that the party summoned as trustee was not indebted to the defendant when summoned, except the judgment be the result of a suit pending before the service of the trustee process.[5] If the garnishee denies his liability to the defendant, the plaintiff is entitled to offer in evidence a judgment recovered by the defendant against the garnishee, and the latter is estopped thereby from maintaining that he is not indebted in the amount of the judgment so recovered against him.[6] If the debt garnished has been assigned, the judgment against the garnishee will protect him if he had no notice of the assignment;[7] but if he receives notice of the assignment, even after he has filed his answer, it is

[1] Herman on Estoppel, sec. 119; Canady *v.* Detrick, 53 Ind. 485; Ladd *v.* Jacobs, 64 Me. 347; Morgan *v.* Neville, 74 Pa. St. 52; Adams *v.* Filer, 7 Wis. 306; 73 Am. Dec. 410; Warner *v.* Conant, 24 Vt. 351; 58 Am. Dec. 178.

[2] Puffer *v.* Graves, 26 N. H. 256; Drew *v.* Towle, 27 N. H. 412; 59 Am. Dec. 380; Carpenter *v.* McClure, 37 Vt. 127; Barton *v.* Allbright, 29 Ind. 489; Tams *v.* Bullitt, 35 Pa. St. 308.

[3] Groves *v.* Brown, 11 Mass. 334; Brown *v.* Dudley, 33 N. H. 511.

[4] Wheeler *v.* Aldrich, 13 Gray, 51; Straus *v.* Ayres, 87 Mo. 348; King *v.* Faber, 51 Pa. St. 387; Adams *v.* Filer, 7 Wis. 306; 73 Am. Dec. 410; Breading *v.* Siegworth, 29 Pa. St. 396; Tams *v.* Bullitt, 35 Pa. St. 308.

[5] Webster *v.* Adams, 58 Me. 317.

[6] Fuller *v.* Foote, 56 Conn. 341.

[7] King *v.* Vance, 46 Ind. 246.

his duty to disclose it, and failing to do so, he will not be protected by the judgment.[1] The assignee, on his part, may be notified to appear and maintain his claims, and if from his neglect to do so judgment is entered against the garnishee, the assignee is estopped by it from enforcing his assignment.[2]

§ 168. **Ancestors and Heirs and Devisees.** — An heir or devisee is in privity with his ancestor or testator. Therefore a verdict for or against the ancestor or testator is evidence for or against an heir or devisee in controversies in relation to property descended from the ancestor to the heir.[3] No such privity exists between heirs and devisees. A decree against the former, establishing that a conveyance of certain lands was made by the ancestor, has no effect upon the rights of the latter.[4]

§ 169. **Lessor and Lessee.** — The lessee and his assignees are in privity with the lessor and his successors in interest; and therefore a judgment for or against the former, before the making of the lease, is evidence for or against the latter.[5] Where an action of ejectment was maintained by the assignee of the lessor against the assignee of the lessee, for non-payment of rent, under a lease containing a covenant for re-entry, the judgment was held to be a bar to any recovery in any action by a party claiming under the purchaser at a foreclosure sale, under a mortgage executed by the assignee of the lessee, subsequent to the execution of the lease, but prior to the commencement of the ejectment suit, the decree of foreclosure being entered after the suit in ejectment was brought, but before it terminated.[6] If a lessee brings an action, in respect to the lands leased, without the direction or authority of the lessor, the latter is not bound by

[1] Lewis *v.* Dunlop, 57 Miss. 130; Seward *v.* Hefflin, 20 Vt. 144; Larrabee *v.* Knight, 69 Me. 320.
[2] Rothschild *v.* Burton, 57 Mich. 540.
[3] Sharkey *v.* Blankston, 30 La. Ann. 891; Ladd *v.* Durkin, 54 Cal. 395; Lock *v.* Norborne, 3 Mod. 142.
[4] Cowart *v.* Williams, 34 Ga. 167.
[5] Hessel *v.* Johnson, 124 Pa. St. 233.
[6] Bennett *v.* Couchman, 48 Barb. 73.

the result of the suit, and therefore cannot bind another by it.[1] A landlord is not, in general, affected by any litigation against or in favor of his tenant in respect to the demised premises;[2] but if the issue is such as involves the lessor's title, and he assumes the defense or the prosecution of the suit, the judgment operates upon his title as though he were named as a party to the action.[3] In some cases the law has been held otherwise. In South Carolina, a landlord is not bound by a judgment against his tenant, though the tenant set up the landlord's title, and the landlord was present in court at the trial, assisting the tenant, and though it is made to appear that his efforts were in no way impeded by the tenant, and full opportunity was given the landlord to examine and cross-examine the witnesses, because if he had been a defendant it might have caused some change in the jury, or in the admissibility of evidence, or have in some manner affected the result.[4] In another case, a judgment against a tenant, after a defense conducted by the landlord, was held admissible, but not conclusive, against the latter.[5] "Upon the ground that the lessor of plaintiff and the tenant are substantially real parties to an ejectment, a judgment in ejectment is admissible evidence in an action for mesne profits, and this, whether the action be brought by the nominal plaintiff or by the lessor of this plaintiff, and whether the judgment be upon verdict or by default."[6]

§ 170. **Officers.** — Successor and predecessor, in relation to offices, are considered to be in privity with each other, like heir and ancestor. A judgment for or against the incumbent, concerning the rights and privileges of his office, is therefore admissible as evidence for or against his successors.[7] A judgment in any controversy affecting

[1] Wenman *v.* Mackenzie, 5 El. & B. 447.

[2] Chant *v.* Reynolds, 49 Cal. 213; Bartlett *v.* B. G. L. Co., 122 Mass. 209.

[3] Valentine *v.* Mahoney, 37 Cal. 389; Sevey *v.* Chick, 13 Me. 141; Tyrrell *v.* Baldwin 67 Cal. 1. See *post*, sec. 185.

[4] Samuel *v.* Dinkins, 12 Rich. 172; 75 Am. Dec. 729.

[5] Chirac *v.* Reinecker, 2 Pet. 617.

[6] 2 Phillipps on Evidence, 10.

[7] Bounker *v.* Atkyns, Skin. 15; Snell *v.* Campbell, 24 Fed. Rep. 880.

the rights of any person to hold an office is conclusive upon the rights of any other person claiming through or under him whose rights have been adjudicated.[1] But whenever the title to an office may be drawn in question by different persons acting in different rights, a judgment against one is not admissible against the other. Judgment in favor of a defendant, upon an information in the nature of a *quo warranto*, filed by the prosecuting attorney of a county upon the relation of an individual, is no bar to a subsequent information of a similar nature, filed by the attorney-general in the exercise of a discretion given him by statute.[2] There are cases indicating that the relation between an officer and his deputy is such that a judgment in favor of the latter is conclusive in favor of the former;[3] but this is not necessarily so. An officer, when answerable for the act of his deputy, may take upon himself the defense of an action, and become the real, or one of the real, parties thereto. When he does this, he is bound by the judgment, we apprehend, because he has in fact had control of the litigation, and an opportunity to make his defense. But if he has not assumed the defense and identified himself with the action, a judgment recovered therein against the deputy cannot conclude the officer.[4]

§ 171. **Tenants in Ejectment.** — The action of ejectment being purely a possessory action, a number of persons are considered as in privity with the defendant therein, to the extent that they must yield up the possession to a prevailing plaintiff, though their title to the property in question remains unadjudicated, and is susceptible of being successfully asserted against the now successful party in some subsequent controversy. When considering the force of a judgment in ejectment, privies

[1] King *v.* Grimes, Bull. N. P. 231.

[2] State *v.* Cinn. Gas Co., 18 Ohio St. 262.

[3] King *v.* Chase, 15 N. H. 9; 41 Am. Dec. 675.

[4] Morgan *v.* Chester, 4 Conn. 387; Geekie *v.* Kirby, 106 U. S. 379.

"are those who entered under, or acquired an interest in the premises from or through, or entered without, title by collusion with defendants subsequent to the commencing of the action."[1] A landlord who receives possession from his tenants pending the suit, and all persons entering under defendants, or as trespassers *pendente lite*, are subject to be dispossessed under the judgment.[2] If a writ of restitution in such cases did not authorize the removal of all persons not in possession at the institution of the suit, a series of transfers of occupancy from one person to another would forever preclude the plaintiff from obtaining the use of his property. In the execution of this writ, it is to be presumed that all the parties found in possession are there as trespassers, or as lessees or purchasers from the defendant *pendente lite*.[3] The statute of California provides that "an action for the recovery of real property against a person in possession cannot be prejudiced by any alienation made by such person, either before or after the commencement of the action."[4]

§ 171 a. **Co-owners.** — A co-owner, by whatever species of co-tenancy he may hold, is not bound by a judgment rendered against his companion in interest.[5] Discussing whether one of several co-heirs could be prejudiced by proceedings against the others, the supreme court of the

[1] Satterlee *v.* Bliss, 36 Cal. 489; Wattson *v.* Dowling, 26 Cal. 124. "The defendant and all the members of his family, together with his servants, employees, and his tenants at will or at sufferance, may be removed from the premises in executing a writ of possession": Freeman on Executions, sec. 475. The wife of defendant is presumed to be in possession under him, and must generally be dispossessed under a writ against him: Freeman on Executions, sec. 475; Johnson *v.* Fullerton, 44 Pa. St. 496; Fiske *v.* Chamberlain, 103 Mass. 495; Huerstal *v.* Muir, 63 Cal. 450; Gray *v* Nunan, 63 Cal. 220; Saunders *v.* Webber, 39 Cal. 287.

[2] Sampson *v.* Ohleyer, 22 Cal. 200; Hanson *v.* Armstrong, 22 Ill. 442; Jones *v.* Chiles, 2 Dana, 25; Howard *v.* Kennedy, 4 Ala. 592; 39 Am. Dec. 307; Smith *v.* Traube's Heirs, 1 McLean, 87; Wallen *v.* Huff, 3 Sneed, 82; 65 Am. Dec. 49; Jackson *v.* Tuttle, 9 Cow. 233.

[3] Long *v.* Morton, 2 A. K. Marsh. 39.

[4] Code Civ. Proc., sec. 747.

[5] Stokes *v.* Morrow, 54 Ga. 597; Bass *v.* Sevier, 58 Tex 567. But after one co-tenant has suffered judgment against himself in an action for an injury to a chattel, he and his co-tenants cannot maintain a joint action for the same injury: Brizendine *v.* Frankfort B. Co., 2 B. Mon. 32; 36 Am. Dec. 587.

state of Georgia said: "Each of these grandchildren was entitled, in his own right, to his share of his ancestor's estate, and to contest any conflicting claim. They do not claim through one another. The interest of each was separate and independent. Therefore a judgment against a part did not prevent the rest from being heard."[1] A part owner is so free from having any interest in the result of a litigation against his co-tenant, that he is not disqualified from being a witness at the trial.[2] A judgment in favor of the defendant, and against one or more of the several tenants in common, in an action of ejectment cannot prejudice any of the co-tenants not parties to that suit. A, B, and C, being owners of the undivided three fourths of the title to a tract of land, were sued in an action of trespass for excavating a part of the land; the title was put in issue, and from some cause judgment was entered against them. Thereafter D, the owner of the remaining fourth, sued the plaintiff in the former action for the possession of the same premises, and established his title. Whereupon the defendant in the second suit insisted that as "A, B, and C were estopped from maintaining any further action by operation of the judgment against them, D could not recover to any greater extent than if the defendant possessed the title of A, B, and C. But the court held that as D," by virtue of his ownership of an undivided interest, was, as against a trespasser, entitled to recover the whole tract, his rights in that respect could not be changed by a proceeding to which he was not a party; that notwithstanding the former judgment, the title of the defendant continued to be as it was prior thereto,—that of a trespasser; and finally, that there was no legal impediment to D's recovering the entire tract, as he could have done before the judgment against his co-tenants.[3] Upon the principle hereinbefore men-

[1] Walker *v.* Perryman, 23 Ga. 314.

[2] Bennett *v.* Hethington, 16 Serg. & R. 195; Hammett *v.* Blount, 1 Swan, 385.

[3] Williams *v.* Sutton, 43 Cal. 71.

tioned, that estoppels must be mutual, it should follow that as a judgment against one co-tenant cannot bind the others, a judgment in his favor cannot be urged by them as an estoppel. This result has not been uniformly conceded. It has been held that a recovery by one co-tenant for a nuisance to the joint possession was conclusive, in a subsequent action in favor of all the co-tenants, that the wrong complained of existed and constituted a nuisance at the commencement of the former action.[1] As against a trespasser, each co-owner has a right to the exclusive possession of the common property, and a judgment in favor of one co-tenant may, by enabling him to recover possession of the entire tract, operate to the advantage of his co-tenants, by stopping the running of the statute of limitations in favor of an adverse holder; but the latter is not estopped by the recovery from contesting the title of the co-tenants who were not parties to the former action.[2]

§ 172. **Remaindermen, and Persons not in Esse.**—If several remainders are limited by the same deed, this creates a privity between the person in remainder and all those who may come after him; and a verdict and judgment for or against the former may be given in evidence for or against any of the latter.[3] Between a tenant for life and a reversioner no privity exists, and a judgment against the former does not bind the latter.[4] "If there are ever so many contingent limitations of a trust, it is an established rule that it is sufficient to bring the trustees before the court, together with him in whom the first remainder of inheritance is vested; and all that may come after will be bound by the decree, though not *in esse*, unless there be fraud and collusion between the trustees and

[1] Fell *v.* Bennett, 110 Pa. St. 181.
[2] Walker *v.* Read, 59 Tex. 187; Read *v.* Allen, 56 Tex. 182.
[3] Rushworth *v.* Pembroke, Hardr. 472; Doe *v.* Tyler, 6 Bing. 390; Pyke *v.* Crouch, 1 Ld. Raym. 730; Johnson *v.* Jacob, 11 Bush, 646.
[4] Adams *v.* Butts, 9 Conn. 79; Allen *v.* De Groot, 9 Mo. 159; 14 Am. St. Rep. 626; Phillipps on Evidence, 14, 15; Freer *v.* Stolenbur, 2 Abb. App. 189; Bartlett *v.* B. G. L. Co., 122 Mass. 209.

the first person in whom the remainder of inheritance is vested."[1] S. P. C. conveyed lands to three trustees, to hold in trust, — 1. To himself for life; 2. Remainder to the heirs of his body; 3. Remainder to R. C. for life; 4. Remainder to the heirs of R. C.'s body; 5. Remainder in fee to the children of S. C. In an action against the trustees, this deed was set aside. S. P. C. and R. C. afterward dying, the children of S. C. commenced suit to obtain their remainder in fee. But it was held that the decree setting aside the deed was binding on them; that the contingent remainders depended on the legal fee and the equitable estate in S. P. C. intermediate, and was liable to be destroyed by anything which defeated those estates.[2] According to the views entertained and expressed by Lord Redesdale, "it is sufficient to bring before the court the first tenant in tail in being, and if there be no tenant in tail in being, the first person entitled to the inheritance, and if no such person, then the tenant for life. It has been repeatedly determined that if there be tenant for life, remainder to his first son in tail, remainder over, and he is brought before the court before he has issue, the contingent remaindermen are barred."[3] But in Maryland, where one sixth of certain property was devised to the testator's daughter "*during her life*, and after her decease, to her *male* children on her body lawfully begotten *or to be begotten*, a bill in equity was filed against this daughter and her two sons, by other part owners of the land, alleging that a partition could not be advantageously made, and praying for a sale of the land and the distribution of the proceeds. A decree was subsequently entered in accordance with this prayer, and was succeeded by the sale of the property thereunder. After the death of the daughter, her five sons commenced an action of ejectment to recover possession of one sixth of the land. Three of

[1] Hopkins *v.* Hopkins, 1 Atk. 590; Goebel *v.* Iffia, 111 N. Y. 170; Clyburn *v.* Reynolds, 31 S. C. 91; Mayer *v.* Hover, 81 Ga. 308.

[2] Campbell *v.* Watson, 8 Ohio, 498.

[3] Giffard *v.* Hort, 1 Schoales & L. 407.

the sons had been born since the rendition of the decree under which the sale had been made, and it was contended that as they were not *in esse* they could not be bound by the decree. The court held that their interest could not be destroyed by their mother as life tenant, nor by their living brothers; "that their rights under the will were indestructible by any act of the parties having interests prior to or in common with them," and therefore that they were not prejudiced by the decree of sale and the proceedings had in pursuance thereof.[1] The difference between the conclusions reached by the court in Maryland, and those announced by Lord Redesdale is this: that in Maryland some person must be brought before the court having an estate of inheritance, and who is on that account entitled to represent both his own interests and the interests of all who may claim after his death; while, according to Lord Redesdale, if there be no person in existence possessing an estate of inheritance, then the tenant for life may be brought before the court and treated as the representative of persons who may, by their subsequent birth, acquire interests in the estate. The views of Lord Redesdale are sustained by a majority of the reported adjudications on this subject.[2]

§ 173. **Trustees and Cestuis que Trust.** — In many instances trustees and their *cestuis que trust* are regarded as being so independent that proceedings against one have no effect upon the other, and both are essential to a complete determination of any action in reference to the trust estate.[3] This rule, however, yields to convenience and neces-

[1] Downin *v.* Sprecher, 35 Md. 478.

[2] Faulker *v.* Davis, 18 Gratt. 684; 98 Am. Dec. 698; Baylor's Lessee *v.* Dejarnette, 13 Gratt. 152; Gaskell *v.* Gaskell, 6 Sim. 643; Miller *v.* Foster, 76 Tex. 479; Miller *v.* T. & P. R'y, 132 U.S. 662; Freeman *v.* Freeman, 9 Heisk. 301; 2 South. L. Rev. 168; Mead *v.* Mitchell, 17 N. Y. 210; 72 Am. Dec. 455; Cockburn *v.* Thompson, 16 Ves. 32; Cheeseman *v.* Thorne, 16 Edw. Ch. 629.

[3] Collins *v.* Lofftus, 10 Leigh, 5; 34 Am. Dec. 719; Sprague *v.* Tyson, 44 Ala. 338; Caldwell *v.* Taggart, 4 Pet. 190; White *v.* Haynes, 33 Ind. 540; Adams *v.* St. Leger, 1 Ball & B. 184; Clemons *v.* Elder, 9 Iowa, 273; Prewitt *v.* Land, 36 Miss. 494; Blake *v.* Allman, 5 Jones Eq. 407; Reed *v.* Reed, 16 N. J. Eq. 248; Martin *v.* Reed, 30 Ind. 218.

sity. Where it is impossible or extremely inconvenient to bring all the *cestuis que trust* before the court, either as plaintiffs or as defendants, on account of their number, the court will allow in the case of plaintiffs a few of the *cestuis que trust* to bring an action, and in the case of defendants, if the trustees are parties defendant, the presence of the *cestuis que trust* may be altogether dispensed with. What number of *cestuis que trust* will be regarded as so great as to obviate the necessity of bringing all of them into court is undetermined. In *Harrison* v. *Stewardson*, 2 Hare, 533, twenty-one *cestuis que trust* were required to be joined; but in other cases, involving circumstances of unusual difficulty, when the number was but little greater, a part were authorized to represent all.[1] No doubt there are many instances in which a trustee is authorized to *represent his cestuis que trust*, and in which the judgment is conclusive on the latter, in the absence of fraud or collusion. Thus where A conveyed certain mortgaged premises to B, in trust, for A's wife, and the mortgagee instituted suit against B to foreclose, who, answering, admitted the facts to be as stated in the complaint, and consented to such decree as might be right, it was held that B was empowered by the nature of his trust to represent the interests of his *cestuis que trust* to this extent, and that in the absence of any evidence of injury to her or her estate, she ought not to be allowed to reverse nor to impeach the decree.[2] When a creditor makes an assignment for the benefit of his creditors, the assignee acquires the legal, and the creditors the equitable, estate. A judgment against the assignee, in relation to property embraced in the assignment, is conclusive, unless it can be avoided for fraud or collusion.[3] It has been said that the *cestuis que trust* of a mortgagee are not necessary parties to

[1] Perry on Trusts, secs. 873, 885, and cases cited in sec. 157 in this work. A part of the beneficiaries cannot represent and bind the others unless their interests are homogeneous: Newton *v.* Egmont, 4 Sim. 574; Bainbridge *v.* Burton, 2 Beav. 539; Richardson *v.* Larpent, 2 Younge & C. 507.

[2] Johnson *v.* Robertson, 31 Md. 476.

[3] Field *v.* Flanders, 40 Ill. 470.

a foreclosure suit, whether such suit is to enforce the mortgage or to make it subordinate to some other lien, and that "a final decree settling the rights of all parties may be made without bringing such *cestuis que trust* before the court."[1] A common form of security is the conveyance of property to trustees, to hold in trust for the purpose of securing the payment of bonds, coupons, and other evidences of indebtedness. In such cases the trustees represent the bond-holders, and proceedings by or against the trustees, conducted in good faith, bind the holders of the bonds or other indebtedness.[2] If a judgment is recovered in the name of A, the law will protect any equitable interest of another person for whose benefit the judgment was intended, and who was the equitable owner of the chose in action on which it was recovered, though the record does not disclose that fact. A garnishee of the nominal plaintiff cannot enforce payment of the judgment to himself.[3] It is not intended that the fact of the legal and equitable title being in different persons shall authorize the same issues to be twice *bona fide* litigated. A suit by A for the use of B, or as A's trustee, is binding on B. No man can be permitted, after adjudicating a matter by his trustee, to disregard that adjudication.[4] The equitable owner of a chose in action is bound to the same extent as if he were a party to the record.[5] The head of a family may be regarded as a *quasi* trustee, in whom the law has reposed the duty of representing and protecting both his own interests and the interests of his family, and a judgment against him may therefore bind them, in respect to interests represented by him in good faith. Hence if a judgment in foreclosure or in ejectment is entered against

[1] N. J. F. Co. *v.* Ames, 12 N. J. Eq. 507; Van Vechten *v.* Terry, 2 Johns. Ch. 197; Johnson *v.* Robertson, 31 Md. 476; Willink *v.* Canal Co., 4 N. J. Eq. 377.

[2] Beals *v.* Illinois M. & T. R'y Co., 133 U. S. 290; Kerrison *v.* Stewart, 93 U. S. 155; Shaw *v.* Railroad Co., 100 U. S. 605; Richter *v.* Jerome, 123 U. S. 233; Glide *v.* Dwyer, 83 Cal. 477.

[3] Hodson *v.* McConnel, 12 Ill. 170.

[4] Peterson *v.* Lathrop, 34 Pa. St. 223; Calhoun *v.* Dunning, 4 Dall. 120.

[5] Rogers *v.* Haines, 3 Greenl. 362; Curtis *v.* Cisna's Adm'r, 1 Ohio, 432; Boynton *v.* Willard, 10 Pick. 166.

a husband, it is conclusive on the wife claiming title on the ground that the property was the community property of herself and her husband,[1] and in some of the states is conclusive on her and other members of the family claiming the same lands as a homestead.[2]

### Part III. — Of Persons Bound, though Neither Parties nor Privies.

§ 174. "Neither the benefit of judgments on the one side, nor the obligations on the other, are limited exclusively to parties and their privies."[3] Or in other words, there is a numerous and important class of persons who, being neither parties upon the record nor acquirers of interests from those parties after the commencement of the suit, are nevertheless bound by the judgment. Prominent among these are persons on whose behalf and under whose direction the suit is prosecuted or defended in the name of some other person.[4] As is illustrated by the case of trustee and *cestui que trust*, the real party in interest cannot escape the result of a suit conducted by him in the name of another.[5] The fact that an action is prosecuted in the "names of nominal parties cannot divest the case of its real character, but the issues made by the real parties, and the actual interests involved, must determine what persons are precluded from again agitating the question, and who are estopped by the previous decision."[6] Whenever one has an interest in the prosecution or defense of an action, and he, in the advancement or protection of such interest, openly takes substantial control of such prosecution or defense, the judgment, when

[1] Thompson *v.* Jones, 77 Tex. 626.

[2] Barfield *v.* Jefferson, 84 Ga. 609; Hightower *v.* Beall, 66 Ga. 102.

[3] Valentine *v.* Mahoney, 37 Cal. 389.

[4] Stoddard *v.* Thompson, 31 Iowa, 80; Conger *v.* Chilcote, 42 Iowa, 18; Estelle *v.* Peacock, 48 Mich. 469; Gill *v.* U. S., 7 Ct. of Cl. 522; Follansbee *v.* Walker, 74 Pa. St. 306; Bennitt *v.* Wilmington S. M. Co., 18 Ill. App. 17; Palmer *v.* Hayes, 112 Ind. 289.

[5] Elliott *v.* Hayden, 104 Mass. 180; Jackson *v.* Griswold, 4 Hill, 522; 2 Phillipps on Evidence, 10; Train *v.* Gold, 5 Pick. 380.

[6] Tate's Ex'rs *v.* Hunter, 3 Strob. Eq. 136; Conger *v.* Chilcote, 42 Iowa, 18; Wood *v.* Ensel, 63 Mo. 193; Cole *v.* Favorite, 69 Ill. 457.

recovered therein, is conclusive for and against him to the same extent as if he were the nominal as well as the real party to the action.[1] If an original insurer carries on in good faith, and for the protection of and with the consent or acquiescence of a reinsurer, a contest respecting a loss, the latter is bound by the judgment. "The reassured and reinsurer stand in the precise relation of all other parties, where there is a liability over, and the result of one litigation binds or concludes both. There is but one matter in issue which is alike common to both, and that is, whether a loss has occurred and a debt has accrued to the original insured.[2] One who would not otherwise have been bound by a judgment does not make himself a party thereto so as to be bound by it, merely by prosecuting a fruitless appeal therefrom.[3]

In many cases parties may be required to participate in an action or to accept the judgment therein as conclusive of their rights. It may be that the decision will fix the liability of a party to another person, as where a receiver has employed an attorney, and the amount to be paid is to be fixed by an order of the court. When the order is made, it settles the amount of compensation to be paid the attorney, and he cannot maintain an action against the receiver for an amount in excess of that allowed.[4] If one of the parties has the right to call upon a third person to indemnify him for losses resulting from an action, as where one is sued for the possession of land which another has conveyed to him with covenants for title or peaceable possession, the person who is thus liable may be notified of the action and required to defend it. Upon receiving such notice and an opportunity to defend the action, he becomes a party thereto, whether he elects to

[1] Linton *v.* Harris, 78 Ga. 265; Daskam *v.* Ullman, 74 Wis. 474; McNamee *v.* Moreland, 26 Iowa, 96; Burns *v.* Garvin, 118 Ind. 320; Montgomery *v.* Vickery, 110 Ind. 211; Foust *v.* Huntington, 113 Ind. 139; Marsh *v.* Smith, 73 Iowa, 295; Verplanck *v.* Van Buren, 76 N. Y. 247; Landis *v.* Hamilton, 77 Mo. 554.

[2] Strong *v.* Phœnix Ins. Co., 62 Mo. 289; 21 Am. Rep. 417.

[3] Majors *v.* Cowell, 51 Cal. 478.

[4] Walsh *v.* Raymond, 58 Conn. 251; 18 Am. St. Rep. 264.

defend or not, so that if the party to whom he is answerable is defeated, and then brings an action for indemnity, the person so notified cannot deny that the recovery was rightful.[1] Therefore if partners are sued, and one of them, being without the state, is not served with process, the others may notify him of the pendency of the action, and if he refuses to participate in the defense the judgment is conclusive against him in a suit by the others for contribution.[2] Where one seeks the benefit of an estoppel by judgment on the ground that he was the real party in interest in an action, he must show that he conducted the action or defense openly, to the knowledge of the adverse party and for the protection of his own interests.[3]

§ 175. **Evidence to Show Who were the Real Parties.** — For the purpose of showing that parties not named in the record were the real parties in interest, and conducted the suit in the name of others, who were only nominal parties, parol evidence may always be offered, and when the showing is made, the real parties are concluded by the judgment.[4]

§ 176. **Parties Bound without Notice.** — In many instances, the relation of the nominal parties to the suit to other persons is such that the latter are conclusively bound by a judgment against the former, in the absence of fraud or collusion, although they are not notified of the pendency of the suit, and are not called upon to conduct its prosecution or defense. In respect to the question, Who are those parties whose interests are thus inseparably associated? the decisions are often inconsistent; but undoubtedly the general principle sanctioned by a vast

[1] Littleton *v.* Richardson, 34 N. H. 177; 66 Am. Dec. 759; State *v.* Coste, 36 Mo. 437; 88 Am. Dec. 148; Davis *v.* Smith, 79 Me. 351; Drennan *v.* Bunn, 124 Ill. 175; 7 Am. St. Rep. 354; Pritchard *v.* Farrar, 116 Mass. 243; Commercial Ass. Co. *v.* Am. Cent. Ins. Co., 68 Cal. 430.

[2] Smith *v.* Ayrault, 71 Mich. 475.

[3] Cannon River M. Ass'n *v.* Rogers, 42 Minn. 123; 18 Am. St. Rep. 497; Lecroix *v.* Lyons, 33 Fed. Rep. 437.

[4] Tarleton *v.* Johnson, 25 Ala. 300; 60 Am. Dec. 515; Shirley *v.* Fearne, 33 Miss. 653; 69 Am. Dec. 376; Palmer *v.* Hayes, 112 Ind. 289.

preponderance of authority is, that every person who has made an unqualified agreement to become responsible for the result of a litigation, or upon whom such a responsibility is cast by operation of law in the absence of any agreement, is conclusively bound by the judgment. This rule will become manifest from an examination of the adjudged cases.[1] "Wherever this identity of interest is found to exist, all alike are concluded. Thus if one covenants for the results or consequences of a suit between others, as if he covenants that a certain mortgage assigned by him shall produce a specific sum, he thereby connects himself in privity with the proceedings, and the record of the judgment in that suit will be conclusive against him. In the case at bar, the appellant, having bound himself that defendants in the attachment suit would cause the slaves levied upon and replevied to be forthcoming to abide the order of the court, has connected himself in privity with the proceedings, and made the judgment conclusive against him."[2]

§ 177. **Corporation and Stockholder.** — Under statutes imposing personal liabilities upon the stockholders for the debts of a corporation, great contrariety of opinion has been exhibited in relation to the effect of a judgment against the latter as evidence of debt against the former. In the first case decided upon this subject in New York, the court of errors, reversing the judgment of Chancellor Kent, held that the stockholders were chargeable, on the ground that the trustees, as agents of the stockholders, had contracted the debt evidenced by the judgment, and that the latter could impeach the indebtedness upon no ground, except fraud or error in liquidation; that the judgment must be regarded "as a solemn admission of indebtedness; but it is not binding as *res judicata* upon

[1] Therefore sureties on a bond on appeal are concluded by a judgment of affirmance: Oakley *v.* Van Noppen, 100 N. C. 287.

[2] Collins *v.* Mitchell, 5 Fla. 371; Rapelye *v.* Prince, 4 Hill, 119; 40 Am. Dec. 267; Greenl. Ev., sec. 523.

the stockholders, if it was procured by fraud or is founded in error.[1] Subsequently, in the same state, it was said, in reference to a judgment recovered upon a note, that "as against the company the judgment is conclusive evidence that the note was valid, and although the defendant was not directly a party, yet, as a stockholder, he was not altogether a stranger to the judgment," and that the judgment constituted a *prima facie* evidence against the stockholder.[2] But the doctrine of these cases was considered as shaken by the opinion of Cowen, J., in *Moss* v. *McCullough*, 5 Hill, 131, and as late as 1860 a majority of the court of appeals in the same state "refused to commit themselves to the doctrine that a judgment against the corporation is even *prima facie* evidence against a stockholder," while, in the opinion of the minority, "a judgment against a corporate body is one of the highest evidences of indebtedness known to the law; it is a solemn admission by record that the corporation owes the sum claimed in the suit," and that "a judgment by confession, in the absence of any pretense of fraud or collusion, is just as conclusive upon a corporation as one rendered after litigation, and a judgment by default is only another mode of declaring by a record estoppel that the corporate body has no just defense, and can say nothing in bar of the claim preferred against it."[3] In a suit against a stockholder, it seems to be necessary to establish the organization and existence of the corporation, and a judgment against the corporation is not conclusive evidence of those facts in such suit.[4] But the existence and organization being proved, there seems, at the present time, to be no doubt that a judgment against a corporation is conclusive evidence of debt against its stockhold-

[1] Slee *v.* Bloom, 20 Johns. 669.

[2] Moss *v.* Oakley, 2 Hill, 265; Moss *v.* McCullough, 7 Barb. 279.

[3] Belmont *v.* Coleman, 21 N. Y. 96; McMahon *v.* Macy, 51 N. Y. 155. But if an action is brought by a creditor to be subrogated to the rights of the corporation to collect unpaid subscriptions of stock, the judgment against the corporation is conclusive evidence of the existence and amount of its indebtedness to the plaintiff: Stephens *v.* Fox, 83 N. Y. 313.

[4] Hudson *v.* Carman, 41 Me. 84.

ers, to be avoided only on proof of fraud, collusion, or mistake, and not upon original grounds;[1] and, generally, "a stockholder is so far an integral part of the corporation that in the view of the law he is privy to the proceedings touching the body of which he is a member,"[2] and is therefore bound by a judgment against a corporation requiring it to levy and collect unpaid assessments on his stock therein.[3]

§ 178. **County or Municipal Corporation, and its Tax-payers and Citizens.** — The position of a county or municipal corporation towards its citizens and tax-payers is, upon principle, analogous to that of a trustee towards his *cestuis que trust*, when they are numerous and the management and control of their interests are by the terms of the trust committed to his care. A judgment against a county or its legal representatives in a matter of general interest to all its citizens is binding upon the latter, though they are not parties to the suit. A judgment for a sum of money against a county imposes an obligation upon its citizens which they are compelled to discharge. Every tax-payer is a real, though not a nominal, party to such judgment. If, for the purpose of providing for its payment, the officers of the county levy and endeavor to collect a tax, none of the citizens can, by instituting proceedings to prevent the levy or enforcement of the tax, dispute the validity of the judgment, nor relitigate any of the questions which were or which could have been litigated in the original action against the county.[4] If

[1] Conklin *v.* Furman, 8 Abb. Pr., N. S., 161; 57 Barb. 484, 504; Miller *v.* White, 8 Abb. Pr., N. S., 46; Milliken *v.* Whitehouse, 49 Me. 527; Bank of Australasia *v.* Nias, 4 Eng. L. & Eq. 252; Came *v.* Brigham, 39 Me. 35; Gaskill *v.* Dudley, 6 Met. 546; 39 Am. Dec. 750; Wilson *v.* Pittsburgh etc. Co., 43 Pa. St. 424; Johnson *v.* Somerville D. Co., 15 Gray, 216; Hawes *v.* Anglo-Saxon P. Co., 101 Mass. 216; Donworth *v.* Coolbaugh, 5 Iowa, 300.

[2] Hawkins *v.* Glenn, 131 U. S. 329.

[3] Hawkins *v.* Glenn, 131 U. S. 319; Hamilton *v.* Glenn, 85 Va. 901; Howard *v.* Glenn, 85 Ga. 238; 21 Am. St. Rep. 156; Glenn *v.* Leggett, 135 U. S. 533. If, however, a corporation has gone into liquidation, a judgment in an action subsequently commenced against it is not conclusive upon its stockholders: Schrader *v.* Manufacturers' Nat. Bank, 133 U. S. 67.

[4] Clark *v.* Wolf, 29 Iowa, 197; 63 Am. Dec. 627; State *v.* Ramey, 74 Mo. 229; Harmon *v.* Auditor, 123 Ill. 122; 5 Am. St. Rep. 502.

in an action against the officers of a county a tax is determined to be valid, a tax-payer of the county cannot afterwards maintain suit to enjoin the collection of such tax.[1] An action having been brought by certain tax-payers of a town to enjoin the issue of bonds, a judgment against them was held to be conclusive upon all other tax-payers.[2] A judgment against county commissioners, directing that a writ of mandate issue requiring them to assemble and call an election on the question of a change of the county site, is conclusive on all citizens of the county, because the commissioners are representatives of the county in the matter of their duties under the statute; and though they failed to avail themselves of any legal defense to the writ, the people of the county are concluded by the judgment.[3]

The great majority of the decisions relating to the privity between a municipality and its tax-payers and citizens have resulted from attempts to resist the enforcement of bonds issued or taxes levied by it, after judgment had been rendered to which it was a party, in favor of such bonds or taxes; but no reason is perceived why the same principle does not apply to other litigated questions. Thus a municipality may claim that certain real estate has been dedicated to public uses, — for instance, that it is a public square or street, — and as a representative of its citizens and tax-payers may litigate that question with one who claims that it is private property, and not subject to any public use whatsoever. The question when once litigated and decided in an action to which the municipality is a proper party should be regarded as forever set at rest, unless some additional title should be acquired by one of the litigants after the commencement of the action. Either this must be true, or each citizen, and perhaps each citizen of each generation of citizens, must

[1] Lyman *v.* Faris, 53 Iowa, 498.
[2] Harmon *v.* Auditor, 123 Ill. 122; 5 Am. St. Rep. 502.
[3] Sauls *v.* Freeman, 24 Fla. 209; 12 Am. St. Rep. 190.

be at liberty to commence an action and litigate the question for himself, either in his own name or in that of the municipality, or of the people of the state, or in some other mode adapted to the litigation of the question. A case determined by the court of appeals of Virginia is sometimes cited as in opposition to the views we have expressed,[1] but an examination of that case will show that it did not present the question here under consideration. In the first place, the preceding action had been ejectment against the city to recover possession of the property, and the court was of the opinion that the existence of the easement claimed by the city could not have constituted any defense to that action, and therefore that the recovery by the plaintiff did not tend to negative the existence of the easement claimed by the city. In the second place, whatever was said upon the subject was a *dictum*, because the court, in the case before it, proceeded no further than to inquire whether the plaintiff had been acting in good faith in the claim made by him to the lands included in his former action, and which the city claimed to be a public street. That the question of the right to the easement was not considered to be involved in the first action is manifest from the following language of the court: "It is to be regretted that in a matter where the public convenience is so much involved that the right to the easement itself had not been presented either by an action of trespass against the city authorities for removing the obstruction, or some proceeding to abate the alleged nuisance, so that the right might have been settled by a court of record having competent authority."

Where, however, the action is such as to put in issue the right of a city in property claimed by it as a public street or square, as where the action is brought against it to determine conflicting claims of title, there appears to be no doubt that a judgment against it is conclusive, in

[1] Warwick *v.* Mayo, 15 Gratt. 528.

all subsequent actions to which it is a party, that the property claimed by it is not such public street or square.[1] In Louisiana, where a claimant brought an action against a municipality to determine whether land had been dedicated to public use, and recovered a judgment, it was held that this judgment was conclusive in a later litigation, wherein another citizen sought to maintain the existence of the dedication, contrary to the former decision, the court saying: "The municipal authorities represent not only the corporators but the public."[2]

After a judgment has been entered against a municipality, determining adversely to it a claim made by it as the representative of its citizens, a similar claim may be made by a proceeding instituted in the name of the state as the representative of the general public, and then the question arises whether the identity of the parties is such that the judgment, when the public was represented by the municipality, is a bar to an action in which the public is represented by the state. It is clear that the issues in the two controversies may be the same; it is equally clear that the nominal parties in the two suits are different, and that in neither suit was the nominal the real party in interest. In both, the real party is the public, in whose behalf the dedication of the property is claimed, and as the real parties are the same, the judgment in the first action should be conclusive in the second.[3] In South Carolina, suit was brought by certain tax-payers against the commissioners of the county to obtain an injunction to prevent their issuing bonds, and resulted in a decree denying the injunction and affirming the right to issue the bonds, and they were thereupon issued and sold to *bona fide* purchasers. Thereafter an action was brought in the name of the state upon the relation of citizens and tax-payers of the same county

[1] San Francisco *v.* Holladay, 76 Cal. 18; City and County of San Francisco *v.* Itsell, 79 Cal. 57.

[2] Xiques *v.* Bujac, 7 La. Ann. 515.

[3] People *v.* Holladay, Sup. Ct. Cal., Feb. 1892.

to have the same bonds declared null and void and issued without authority of law. The judgment in the suit was held to be a bar to the second action, because the state had no substantial interest in the action in which its name was used, and the two actions were for the benefit of the same class of persons, and that "it is not reasonable to suppose that the state, in lending its name to individuals for the protection of their rights, intended to subvert the principles governing controversies of the class to which this belongs."[1] On the other hand, in Kansas, where an elector of the county, in a proceeding commenced by him, procured a writ of *mandamus* to issue compelling the county clerk to remove his office to a town claimed to be the county seat, it was held that this was not conclusive against a proceeding in *mandamus* subsequently instituted by the attorney-general in the name of state, "to compel obedience to the law of the state, commanding county officers to keep their offices at the county seat." Disposing of this question, the court said: "This plea of *res adjudicata* is fairly in the case, and must be determined. A majority of the court hold that the judgment and proceedings in the Hammond case do not conclude the relator in this case, and that the judgment as pleaded and set forth is no bar to this action; that while there may be some identity of cause of action, the state can interfere in matters of this kind, in the interest of peace and good order, and to command obedience to its laws, and that for this purpose it cannot be concluded by suits brought by private persons to protect or enforce private rights. In the case of *Garner* v. *State, upon the Relation of Moon*, 28 Kan. 790, it was said: 'While the statute permits any elector who considers himself aggrieved by the result of any election held for removing, establishing, or relocating the county seat of a county to contest by an action in the district court such election, yet if different actions are brought, and different judgments are rendered, it is possible

[1] State *v.* Chester and Lenoir R. R. Co., 13 S. C. 290.

that the attorney-general or county attorney, in the interest of the public, might, in a proper action instituted for that purpose, have all these different judgments reviewed and superseded by a general adjudication as to which town, city, or place is the legal county seat of a county, and thus bring all the county officers, with their books, papers, and records, to such town, city, or place, as the county seat.'"[1]

Though its officer is a nominal party to a suit and the municipality is not joined with him, a judgment is conclusive for or against it if it was the real party in interest, and, as such, prosecuted and defended the action.[2] It is only to the extent that a county or municipal corporation represents persons that a judgment against it is binding upon them. It does not represent its citizens and tax-payers in respect to their private property, but only in matters of general interest, and therefore a judgment against or in favor of a municipality, concerning a single lot or other matter in which one of its citizens has a private interest, cannot bind him.[3] So though a county or city represents its citizens and tax-payers respecting matters of general interest, it is not the representative of other citizens of the state interested in the same general question. Hence a judgment against it cannot conclude other counties or municipalities in a subsequent action, though the issues involved are the same.[4]

§ 179. **Master and Servant.** — A suit was commenced against a master for a trespass committed by his servant, under his order and direction. After a trial upon the merits, ending in a judgment for the defendant, it was held that the plaintiff was thereby precluded from maintaining an action against the servant for the same trespass.[5] Where a servant was sued for trespass in taking

[1] State *v.* Stock, 38 Kan. 154.

[2] Millikan *v.* La Fayette, 118 Ind. 323; Faust *v.* Baumgartner, 113 Ind. 139.

[3] Rork *v.* Smith, 55 Wis. 67.

[4] St. Paul & S. C. R. R. Co. *v.* Robinson, 41 Minn. 394.

[5] Emery *v.* Fowler, 39 Me. 326; 63 Am. Dec. 627; Kitchen *v.* Campbell, 3 Wel. 304; Kinnersley *v.* Orpe, Doug. 517; Alexander *v.* Taylor, 4 Denio, 302.

property, and the master defended the suit, and justified his servant in the taking, it was decided that the judgment was conclusive on the master, because it was his duty to indemnify the servant in acting as his agent, and that he was bound to appear and defend, and that a judgment in his servant's favor was conclusive as a defense to an action by the same plaintiff against the master for the same trespass.[1]

§ 180. **Principal and Surety.** — The law in relation to the effect of a judgment against a principal, for the purpose of charging the surety, is differently understood and applied in the different states. And in the same state distinctions are made between different classes of sureties. It seems to be generally conceded, however, that wherever a surety has contracted in reference to the conduct of one of the parties in some suit or proceeding in the courts, he is concluded by the judgment.[2] Thus a judgment against a defendant is conclusive upon his bail, if free from fraud or collusion; and they cannot show that it is for too great a sum, nor that it was obtained on account of the default or negligence of the principal.[3] The sureties upon an injunction bond "assume such a connection with that suit that they are concluded by a judgment in it in a suit at law upon the bond, so far as the same issues are involved.[4] The same rule applies against sureties who have become parties to a bond for the redelivery of property replevied, or to dissolve an attachment, or to release attached property. Upon the entry of a judgment in plaintiff's favor, their liability is absolute.[5]

[1] Castle *v.* Noyes, 14 N. Y. 329.

[2] Harvey *v.* Head, 68 Ga. 247; Riddle *v.* Baker, 13 Cal. 295; Rapelye *v.* Prince, 4 Hill, 121; 40 Am. Dec. 267; Binsse *v.* Wood, 37 N. Y. 526; Bently *v.* Dorcas, 11 Ohio St. 398; Braiden *v.* Mercer, 44 Ohio St. 339; Murdock *v.* Brooks, 38 Cal. 601; Jones *v.* Dolls, 3 La. Ann. 588; Tracy *v.* Maloney, 105 Mass. 90; Pasewalk *v.* Bollman, 45 N. W. Rep. 780 (Neb.).

[3] Parkhurst *v.* Summer, 23 Vt. 538; 56 Am. Dec. 94; Riddle *v.* Baker, 13 Cal. 295; Way *v.* Lewis, 115 Mass. 26; Keane *v.* Fisher, 10 La. Ann. 261; Binsse *v.* Wood, 37 N. Y. 526. See also Stoops *v.* Wittler, 1 Mo. App. 420.

[4] Towle *v.* Towle, 46 N. H. 432; Church *v.* Barker, 18 N. Y. 463.

[5] Jaynes *v.* Platt, 47 Ohio St. 262; Boyd *v.* Huffaker, 40 Kan. 634; Cutter *v.* Evans, 115 Mass. 27; Tappan *v.* Goodsell, 122 Mass. 176; Collins *v.* Mitchell, 5 Fla. 364; Craig *v.* Herring, 80 Ga. 709; Thomson *v.* Josslin, 12 S. C. 580.

Sureties upon the bond of an executor or an administrator also occupy a position in which their responsibility may be fixed in suits to which they are not parties, and in which they are not tendered an opportunity to defend, or by the orders of the court by which they were appointed settling their accounts and determining the extent of their liability.[1] "If a judgment has been recovered against an administrator, and an action thereon be commenced against the surety on his bond to the ordinary, such judgment is conclusive, unless the surety can show that it was obtained through fraud or collusion between the creditor and the administrator."[2] The only questions open to the sureties in a suit on such a bond, after judgment against their principal, are in reference to the making of the bond and its legal sufficiency.[3] "When judgment has been recovered in a court of competent jurisdiction against an administrator, showing that he has received funds belonging to an estate, and has failed to pay over the same, a breach of his administration bond is established. By this judgment the administrator is bound, and the sureties are concluded to the same extent which their principal is concluded."[4]

But as to administrators and executors, the rule that their sureties are concluded by settlements of their accounts or by judgments against them fixing their liability is not in force in many of the states. In these states the effect of such settlements is, as against the sureties, unless they were parties to or participants in the prior action or proceeding, *prima facie* only.[5] In all the states

[1] Slagle *v.* Entrekin, 44 Ohio St. 637; Casoni *v.* Jerome, 58 N. Y. 315; Ralston *v.* Wood, 15 Ill. 159; 58 Am. Dec. 604; White *v.* Weatherbee, 126 Mass. 450; State *v.* Holt, 27 Mo. 340; 72 Am. Dec. 273; Irwin *v.* Backus, 25 Cal. 214; 85 Am. Dec. 125; McCalla *v.* Patterson, 18 B. Mon. 201; Martin *v.* Tally, 72 Ala. 23; Housh *v.* People, 66 Ill. 178; Heard *v.* Lodge, 20 Pick. 53; 32 Am. Dec. 197; Thurlough *v.* Kendall, 62 Me. 166.

[2] Boyd *v.* Caldwell, 4 Rich. 117; State *v.* Coste, 36 Mo. 437; 88 Am. Dec. 148.

[3] Watts *v.* Gayle, 20 Ala. 817; Willey *v.* Paulk, 6 Conn. 74.

[4] Stovall *v.* Banks, 10 Wall. 583; Jones *v.* Ritter's Adm'r, 56 Ala. 270.

[5] Lipscomb *v.* Postell, 38 Miss. 476; 77 Am. Dec. 651; Seat *v.* Cannon, 1 Humph. 471; Bennett *v.* Graham, 71 Ga. 211; Norton *v.* Wallace, 1 Rich. 507; Hobson *v.* Yancey, 2 Gratt. 73.

sureties may avoid a judgment against their principal by showing that it was procured by fraud and collusion.[1] The sureties of guardians occupy a position analogous to that of the sureties of administrators; and there is the same diversity of judicial opinion respecting the effect upon them of a decree settling the accounts or a judgment determining the liability of their principal, the majority of the cases holding them bound by such settlements and judgments, in the absence of fraud or collusion.[2] In the case of administrators, executors, and guardians, the duties imposed on them by law generally include their accounting to the court having jurisdiction of the estates committed to their care, and there obtaining a settlement of their accounts. The rendering true accounts and having them settled is a part of the duties for the performance of which the sureties have become bound, and there is therefore more reason to hold them bound by judicial determinations of the liability of their principals than there is any other class of sureties, excepting only those who have expressly made themselves answerable for the payment of judgments, or for other results of litigation. When we come to consider sureties on other official bonds, we shall still find a diversity of opinion; but the cases holding judgments against a principal not to be conclusive against his sureties are relatively more numerous,[3] though probably still in the minority.[4]

[1] Annett *v.* Terry, 35 N. Y. 256; Dawes *v.* Shed, 15 Mass. 6; 8 Am. Dec. 80; Robinson *v.* Hodge, 117 Mass. 222; Irwin *v.* Backus, 25 Cal. 214; 85 Am. Dec. 125.

[2] Brodrib *v.* Brodrib, 56 Cal. 563; Hailey *v.* Boyd, 64 Ala. 399; Commonwealth *v.* Rhoads, 37 Pa. St. 60; Shepard *v.* Pebbles, 38 Wis. 373; McCleary *v.* Menke, 109 Ill. 294; Braiden *v.* Mercer, 44 Ohio St. 339; McWilliams *v.* Kalback, 55 Iowa, 110. *Contra*, State *v.* Hull, 53 Miss. 626; Moore *v.* Alexander, 96 N. C. 34.

[3] That judgment against a sheriff or constable is *prima facie* evidence against his sureties, but not conclusive: Crawford *v.* Wood, 7 Ga. 445; Graves *v.* Bulkley, 25 Kan. 249; 37 Am. Rep. 249; Fay *v.* Edmiston, 25 Kan. 439; Mullen *v.* Scott, 9 La. Ann. 173; State *v.* Carson, 11 S. C. 392; Cox *v.* Thomas, 9 Gratt. 323; Aikins *v.* Baily, 9 Yerg. 111.

[4] That judgment is conclusive against sureties: Evans *v.* Commonwealth, 8 Watts, 398; 34 Am. Dec. 477; Dane *v.* Gilmore, 51 Me. 544; Tute *v.* James, 50 Vt. 124; Dennie *v.* Smith, 129 Mass. 143; McMicken *v.* Commonwealth, 58 Pa. St. 213; Masser *v.* Strickland, 17 Serg. & R. 354; 17 Am. Dec. 668. The following, while they declare the judgment to be *prima facie* only, ap-

The rule is sometimes made to depend on the question whether the bond is joint or several in its nature. Thus it is said that a judgment obtained against a constable for wrongful attachment is, in the absence of a fraud or collusion, conclusive evidence in an action against him and his sureties, both as to damages and to costs, if his bond is joint, because the principal is liable and his bondsmen must be jointly liable with him.[1]

A bond was given by a deputy sheriff to his principal, conditioned that the deputy should "well and faithfully, in all things, perform and execute the duties of deputy sheriff without fraud, deceit, or oppression." The sheriff, being sued for an act of the deputy, gave notice to the latter, but not to his sureties. Judgment being rendered against the sheriff, he offered it as evidence in an action by him against the sureties, whereupon it was decided that "the terms of the condition of this bond do not bring it within the class of cases in which an indemnitor is concluded by the result of a suit against the person whom he has undertaken to indemnify, upon the ground that such is the fair interpretation of the terms of the contract. This condition is only that he will do his duty as deputy sheriff. In the class of cases alluded to, the contract of indemnity is held to stipulate for the result of a litigation to which the indemnitor is not a party, and to make his liability to depend merely upon that result. There is therefore no reason why this case, in which the language of the condition admits of no similar construction, should be taken out of the general rule which declares the effect of judgments as to strangers, that they conclusively prove *rem ipsam*, and nothing else."[2] In a subsequent case in

parently limit the defense of the sureties to fraud and collusion: Charles *v.* Hoskins, 14 Iowa, 471; 83 Am. Dec. 378; People *v.* Mersereau, 74 Mich. 687; Lowell *v.* Parker, 10 Met. 309; 43 Am. Dec. 436; State *v.* Colerick, 3 Ohio, 487.

[1] Tracy *v.* Goodwin, 5 Allen, 409.

[2] Thomas *v.* Hubbell, 15 N. Y. 405; 69 Am. Dec. 619; reversing and overruling the opinion in the same case reported in 18 Barbour, 9. The same case was again decided on appeal in 35 New York, 120. "Although there is a conflict of authority on the subject, it seems to be the better opinion that, except in cases where, upon the fair construction of the contract, the surety

the same state, a deputy had given a joint bond, with sureties, to the effect that the obligors "should well and sufficiently indemnify and keep harmless 'the principal' from and of all manner of costs, charges, damages, and expenses which he might incur or be put to by reason of any act or acts, omission or omissions, of the deputy in or about the execution of his office of deputy sheriff." In an action against the sheriff, he notified the deputy, who appeared and managed the defense. No notice was given the sureties. The sureties sought to avoid the effect of the judgment as evidence against them. But the condition of this bond was considered as materially different from that in the case of *Thomas* v. *Hubbell*, and great stress was laid upon the fact that the bond was joint.

"The defendants being jointly bound to indemnify the plaintiff, they were in privity of contract with each other, and are to be regarded and treated, *quoad* the contract, and the rights and liabilities connected with and growing out of it, as one person. In such a case, notice to one is notice to all, on the same principle as where two or more persons are shown to be jointly bound by a contract, the acts and admissions of either are binding upon all the others to the same extent as upon the one doing the acts or making the admissions. It was no part of plaintiff's agreement with the sureties on the bond that they should have notice of suits brought against him for the misconduct of his deputy, and their liability as indemnitors was not made to depend on such notice. The law indeed required notice to the deputy, in order that he might defend and discharge himself from the misconduct imputed to him, and for the purpose of rendering the judgment against the sheriff conclusive, if one should be

may be held to have undertaken to be responsible for the result of a suit, or when he is made privy to the suit by notice, and the opportunity being given him to defend it, a judgment against the principal alone is, as a general rule, evidence against the surety, of the fact of its recovery only, and not of any fact which it was necessary to find in order to recover such judgment": Brandt on Suretyship, sec. 524; De Grieff *v.* Wilson, 30 N. J. Eq. 435.

obtained. The notice was properly given to the deputy, whose conduct only was called in question, and who is presumed to know the facts and circumstances far better than the sureties or the sheriff. If, in addition to giving notice to the deputy, notice had been given to the sureties also, it would have been little more than an idle and useless ceremony, as it is to be presumed that all they would or could have done would have been to refer the matter to their principal, the deputy, and cast the burden of the defense, as the sheriff has done. By a fair and reasonable interpretation of the conditions of the bond, the parties contemplated that actions might be brought against the sheriff for the acts or omission of his deputy, and the covenant of indemnity in the condition was inserted to provide for such contingencies."[1]

In respect to sureties upon bonds and contracts other than those already noticed, the contrariety of opinion concerning the effect upon them of a judgment against their principal is very marked and irreconcilable. The most extreme ground taken against such a judgment was that assumed in a couple of cases in New York, where it was held that a surety, though notified of a suit against his principal, and though assisting in conducting it, was not bound by the judgment, unless admitted to defend in the name of the principal, because he could not have appeared nor have managed the suit, except by the consent of his principal, nor could he take an appeal.[2] In a number of cases a judgment or decree against the principal was considered as constituting not even *prima facie* evidence against the surety.[3] These cases are, however, opposed by more numerous cases, which unite in declaring the *prima facie* effect of such a judgment as evidence

[1] Fay *v.* Ames, 44 Barb. 327. See also Westervelt *v.* Smith, 2 Duer, 449; Chamberlain *v.* Godfrey, 36 Vt. 380; 84 Am. Dec. 690.

[2] Jackson *v.* Griswold, 4 Hill, 522; Douglas *v.* Howland, 24 Wend. 35.

[3] Lartigue *v.* Baldwin, 5 Mart. (La.) 193; Beall *v.* Beck, 3 Har. & McH. 242; McKellar *v.* Bowell, 4 Hawks, 34; Morris *v.* Lucas, 8 Blackf. 9; King *v.* Norman, 4 Com. B. 884.

against a surety,[1] but differ somewhat as to the means by which this *prima facie* evidence may be rebutted. In Georgia, the surety "may rebut this evidence; and he may not only look into the judgment or decree against his principal, but he may inquire into its justness, *ab origine*. He may set up and prove any defense he could have proved in the original suit, if he had been a party to it."[2] In Ohio, the surety may impeach the judgment for collusion or for mistake. But until so impeached it is sufficient to entitle plaintiff to recover the amount for which it was rendered.[3] In one of the circuit courts of the United States, the rule is laid down that the surety may show fraud or collusion, or that the debt has been paid, or that there was a clerical mistake in entering judgment.[4] A bond was given to the state to the effect that the principal would not keep a disorderly house. In an action against the surety upon the bond, it was held that the conviction of the principal, in a criminal prosecution for keeping a disorderly house, was *prima facie* evidence against the surety.[5]

A judgment against a surety, obtained without fraud or collusion, in an action of which the principal or any co-surety had notice, is conclusive in favor of the surety in an action against the principal or the co-surety for contribution.[6] If a judgment rendered against a principal and a surety upon their bond is paid by the latter, the former cannot, in a suit to recover from him the amount thus paid, show want of consideration in the bond.[7]

§ 181. **Notice to Indemnitors.** — In many cases it happens that if, by reason of the finding of certain facts, one

[1] Munford *v.* Overseers, 2 Rand. 313; Jacobs *v.* Hill, 2 Leigh, 393; Baker *v.* Preston, 1 Gilmer, 235; Respublica *v.* Davis, 3 Yeates, 128; 2 Am. Dec. 366; Lucas *v.* Curry, 2 Bail. 403; Brandt on Suretyship, sec. 525; Macready *v.* Schenck, 41 La. Ann. 456; Haddock *v.* Perham, 70 Ga. 572; Curry *v.* Mack, 90 Ill. 606; Fletcher *v.* Jackson, 23 Vt. 581; 56 Am. Dec. 98; Preslar *v.* Stalworth, 37 Ala. 402; Spencer *v.* Dearth, 43 Vt. 98.

[2] Bryant *v.* Owen, 1 Ga. 355; Bradwell *v.* Spencer, 6 Ga. 578.

[3] State *v.* Colerick, 3 Ohio, 487.

[4] Berger *v.* Williams, 4 McLean. 577.

[5] Webbs *v.* State, 4 Cold. 199.

[6] Love *v.* Gibson, 2 Fla. 598.

[7] Pitts *v.* Fugate, 41 Mo. 405.

of the parties to the suit is in any respect damaged, he, in turn, has the right to recover back the amount of damages from some other person, not a party to the present litigation. The person thus exposed to a loss which some one has, in effect, covenanted against, may make his covenantor a party to the present suit, and may thus avoid the peril and inconvenience of being required to establish against his covenantor, in a subsequent controversy, the facts which may be established by the plaintiff in the present suit.[1] In order to become thus bound, the covenantor must be tendered "a full, fair, and *previous* opportunity to meet the controversy," and it is not sufficient that he happened to be present in court, and may have cross-examined the witnesses.[2] It seems, upon the principle that no one shall be condemned or made answerable without an opportunity to defend, that in order to bind one by a judgment to which he is not a party, he should be allowed all the means of defense open to him had he been made a party; and that a nominal party wishing to bind by a judgment one not a party to the action must not only notify him of its pendency, but give him to understand that he is desired to defend it, and will be allowed such control as may be essential to his defense.[3] In Michigan, one who wishes to bind a warrantor of the title to real estate by a judgment must give him written notice;[4] but elsewhere oral notices, if not otherwise objectionable, are sufficient.[5] No particular form of words is required. The party must certainly have notice of the pendency of the action, and this notice must be given at such a time as will permit of his having a fair opportunity of making a defense.[6] It is not certain that

[1] Konitzky *v.* Meyer, 49 N. Y. 471; Todd *v.* Chicago, 18 Ill. App. 565.

[2] Turpin *v.* Thomas, 2 Hen. & M. 139; 3 Am. Dec. 615.

[3] Eaton *v.* Lyman, 26 Wis. 61; Saveland *v.* Green, 36 Wis. 612; Axford *v.* Graham, 57 Mich. 422.

[4] Mason *v.* Kellogg, 38 Mich. 132.

[5] Ferrea *v.* Chabot, 63 Cal. 564; Miner *v.* Clark, 15 Wend. 425; Cummings *v.* Harrison, 57 Miss. 275; Davenport *v.* Muir, 3 J. J. Marsh. 310; 20 Am. Dec. 143.

[6] Williams *v.* Burg, 9 Lea, 455; Somers *v.* Schmidt, 24 Wis. 421; 1 Am. Rep. 191; Hersey *v.* Long, 30 Minn. 114; Boyd *v.* Whitfield, 19 Ark. 447; Davis *v.* Wilbourne, 1 Hill (S. C.) 27; 26 Am. Dec. 154.

he must be requested to assume the defense, some of the decisions declaring this not to be essential.[1] In general, the fact that the covenantor appeared and conducted or participated in the defense is of itself sufficient proof that he had due notice of the action, and a full and fair opportunity to contest it on the merits.[2] But in the absence of such appearance, the question arises whether he was given such notice of the suit as made him responsible for its termination. The necessity of proof of such a notice cannot be avoided by showing that the warrantor sought to be bound, was a witness,[3] or knew and talked of the action, said he had an agreement which would defeat it, and was informed of the time and place of the trial.[4] "If a party to a suit has the right to resort to another upon his failure in the action, whether upon covenants of warranty or on the ground that he is indemnified by such third party, then it is clearly his duty to give full notice to his covenantor or indemnitor of the pendency of the suit what it is he requires him to do in the suit, and the consequences which may follow if he neglects to defend. Mere knowledge of the existence of such action is entirely insufficient to bind the party by the judgment. Unless he is notified to furnish testimony, or to defend the action or to aid in it, he may well suppose the party to be in need of no assistance, and he may well rely upon that supposition; for if the party desires his aid, it is his duty to give him a full notice a reasonable time before the trial of the action, to enable him to prepare for it.[5] In an action against a town or city for a defect in one of its highways, caused by A, the judgment against the city, if A be notified of the suit, is conclusive in a subsequent suit against him by the city, in relation to the existence of the defect, the amount of injury to the individual, and

[1] Cummings *v.* Harrison, 57 Miss. 275; Heiser *v.* Hatch, 86 N. Y. 614.

[2] Harding *v.* Larkin, 41 Ill. 413; Mackey *v.* Fisher, 36 Minn. 347; Davis *v.* Smith, 79 Me. 351.

[3] Lebanon *v.* Mead, 64 N. H. 8.

[4] Paul *v.* Witman, 3 Watts & S. 409.

[5] Sampson *v.* Ohleyer, 22 Cal. 200; Peabody *v.* Phelps, 9 Cal. 213.

the fact of the exercise of due caution by the party injured.[1] Some recent decisions in courts of very high authority, enforcing the rights of a city to recover back from a property holder a sum which it has been compelled to pay, on account of his act or negligence, for personal injuries occasioned by a defect in its highways, either establish an exception to the usual rule in regard to notices to defend, or else dispense with several essentials of such notices, as the law was formerly understood. In Massachusetts, it is sufficient to bind the property holder by the judgment against the city, if he had notice of the pendency of the suit, and of the fact that the city intended to hold him responsible, and had an opportunity to furnish evidence, though he did not take upon himself the defense of the suit, and was not requested to do so.[2] Cases in the supreme court of the United States go much further in the same direction. In the first of these cases it is maintained that a property owner who knows of a suit pending against the city for damages in front of his lot is, in an action against him by the city, bound by the judgment against the city; and upon such judgment being produced, can only show in his defense that the damages were caused or contributed to by the city herself. It is not necessary that any notice be served informing him that the city will hold him responsible.[3] In a later case involving similar issues, the court said: "Express notice is not required; nor was it necessary for the officers of the corporation to have notified him that they would look to him for indemnity. The conclusive effect of a judgment respecting the same cause of action, and between the same parties, rests upon the just and expe-

[1] Littleton *v.* Richardson, 34 N. H. 179; 66 Am. Dec. 759; Veazie *v.* Railroad, 49 Me. 119; Melford *v.* Holbrook, 9 Allen, 17; 85 Am. Dec. 735; Village of Port Jervis *v.* First Nat. Bank, 96 N. Y. 550; District of Columbia *v.* Balt. & P. R. R. Co., 1 Mackey, 314; Western and Atlantic R. R. Co. *v.* Atlanta, 74 Ga. 774; City of Portland *v.* Richardson, 54 Me. 46; 89 Am. Dec. 729.

[2] Boston *v.* Worthington, 10 Gray, 496; Inhabitants *v.* Holbrook, 9 Allen, 17.

[3] City of Chicago *v.* Robbins, 2 Black, 418.

dient axiom that it is for the interest of the community that a limit should be opposed to the continuance of litigation; that the same cause of action should not be brought twice to a final determination. Parties include all who are directly interested in the subject-matter, and who have the right to make defense, control the proceedings, examine and cross-examine witnesses, and to appeal from the judgment. Persons not having those rights, substantially, are regarded as strangers to the cause; but all who are directly interested in the suit and have knowledge of its pendency, and who refuse or neglect to appear and avail themselves of these rights, are equally concluded by the proceedings."[1]

§ 182. **Attachment Proceedings.** — If property is attached, and the defendants in the attachment or the general assignees put in their claim to the property, and are heard in full in reference to such claim, they become parties to the proceeding, and bound by the judgment.[2] Any creditor who defends an attachment on the ground that the debt attached is due to him is precluded, if he fails in his defense, from contesting the validity of the attachment as against the plaintiff or as against the garnishee.[3]

§ 183. **Bailee or Bailor.** — If in an action against the bailee for the property the bailor employed counsel and managed the case, and put his title in issue as a defense for the bailee, the judgment is conclusive on all the title of the bailor at the time of its rendition.[4]

§ 184. **Officers and their Indemnitors.** — A party who indemnifies an attaching officer, and who, when suit is brought, appears and has complete control of its defense, is bound by the judgment as an estoppel in a subsequent

[1] Robbins *v.* City of Chicago, 4 Wall. 658.

[2] Moore *v.* Spackman, 12 Serg. & R. 287.

[3] Coates *v.* Roberts, 4 Rawle, 104; Richardson *v.* Watson, 23 Mo. 34; Tarleton *v.* Johnson, 25 Ala. 300; 60 Am. Dec. 515.

[4] Tarleton *v.* Johnson, 25 Ala. 300; 60 Am. Dec. 515.

litigation, to the same extent as if he were a party to the record.[1] He is equally bound where, though not participating in the conduct of the suit, he was given due notice of the action, and was tendered an opportunity to assist in its defense.[2] If no notice of the suit is given, and no opportunity is allowed him to make a defense, a judgment is but *prima facie* evidence against an indemnitor.[3] "Covenants to indemnify against the consequences of a suit are of two classes: 1. Where the covenantor expressly makes his liability depend on the event of a litigation to which he is not a party, and stipulates to abide the result; and 2. Where the covenant is one of general indemnity merely, against claims or suits. In cases of the first class, the judgment is conclusive evidence against the indemnitor, although he was not a party and had no notice; for its recovery is the event against which he covenanted.[4] In those of the second class, the judgment is *prima facie* evidence only against the indemnitor, and he may be let in to show that the principal had a good defense to the claim.[5] In each of the classes of cases above mentioned, the indemnitor is, of course, understood as saving the right, which the law gives in every case where the suit is between third persons, of contesting the proceeding on the ground of collusion, for the purpose of charging him,"[6] and also of showing that the judgment resulted from illegal or unauthorized acts of the officer subsequent to the writ under which the indemnity was given, or of his misconduct in the service of other writs.[7]

§ 185. **Tenant and Landlord.** — When a judgment has been entered against a tenant for the possession of lands

[1] Murray *v.* Lovejoy, 2 Cliff. 191; Lovejoy *v.* Murray, 3 Wall. 1.
[2] Miller *v.* Rhoades, 20 Ohio St. 494.
[3] Stewart *v.* Thomas, 45 Mo. 44; Robinson *v.* Baskins, 53 Ark. 330.
[4] Patton *v.* Caldwell, 1 Dall. 419.
[5] Duffield *v.* Scott, 3 Term Rep. 374; Smith *v.* Compton, 3 Barn. & Adol. 407; Lee *v.* Clark, 1 Hill, 56; Rapelye *v.* Prince, 4 Hill, 119; 40 Am. Dec. 267; Aberdeen *v.* Blackmar, 6 Hill, 324; Taylor *v.* Barnes, 69 N. Y. 430; Comstock *v.* Drohan, 15 N. Y. Sup. Ct. 373.
[6] Bridgeport Ins. Co. *v.* Wilson, 34 N. Y. 280.
[7] Boynton *v.* Morrill, 111 Mass. 4.

held by him, it may be offered in evidence against his landlord, either in a controversy between him and the tenant, or between the landlord and the plaintiff in the former action, or his successor in interest. If the landlord did not participate in the defense, and was not notified of the pendency of the previous action, the judgment therein is not admissible against him for any purpose, except to show the fact of its recovery and that the defendant therein has ceased to hold as his tenant.[1] If in an action between the landlord and his tenant the latter relies upon a judgment rendered against himself for the possession of property, he must show that his landlord had notice of the action and a fair opportunity to defend it, otherwise the tenant's attornment to the plaintiff in such judgment cannot be justified;[2] while, on the other hand, if a tenant has notified his landlord of the action, and given him an opportunity to defend it, the latter cannot, in opposition to the judgment against the tenant, insist that his eviction was not by title paramount.[3] If the landlord actually takes upon himself the defense of an action brought against his tenant, and conducts the litigation to the end, he would seem, upon principle, to be bound by the final result. We have not, however, discovered any decision necessarily affirming that even under such circumstances the landlord is bound by the judgment against his tenant; and perhaps it is fairly inferable from the decisions upon the subject that it is only when the landlord is formally made a party defendant that he becomes a party, as between himself and the plaintiff, so as to be estopped by a judgment in favor of the latter.[4]

[1] Chant *v.* Reynolds, 49 Cal. 213; Striddle *v.* Saroni, 21 Wis. 175; Bradt *v.* Church, 110 N. Y. 537; Read *v.* Allen, 58 Tex. 380; Oetgen *v.* Ross, 47 Ill. 142; 95 Am. Dec. 468; Powers *v.* Schoeltens, 79 Mich. 299.

[2] Douglas *v.* Fulda, 45 Cal. 592.

[3] Wheelock *v.* Warschauer, 34 Cal. 265; McCreery *v.* Everding, 54 Cal. 168; Chambers *v.* Lapsley, 7 Pa. St. 24.

[4] Ryerss *v.* Ripley, 25 Wend. 432; Samuel *v.* Dinkins, 12 Rich. 172; 75 Am. Dec. 729; Bolls *v.* Smith, 5 Sneed, 105; Stout *v.* Tall, 71 Tex. 438; Orthwein *v.* Thomas, 127 Ill. 554; 11 Am. St. Rep. 159; Smith *v.* Gayle, 58 Ala. 600; Kent *v.* Lasley, 48 Wis. 257.

§ 186. **Vendee and Vendor.**—A vendee is in privity with his vendor, and bound by judgments against him and entitled to the benefits of judgments in his favor rendered previously to the sale of the property.[1] But a vendee is not in privity with his vendor as to proceedings instituted after the transfer,[2] though such transfer was not recorded.[3] So where a transfer is involuntary, as where it is made by virtue of an execution, judicial, or trustee's sale, it takes effect by relation as of the date of the lien or trust deed under which the sale was made, and cannot be affected by any judgment against the latter in an action commenced after such date.[4] A purchaser, or any subsequent vendee, upon being sued for the property, in trover or replevin, or in any action involving the title, may give notice of the pendency and nature of the suit, to the original vendor, and require him to defend or to assist in defending the same, and after such notice the vendor, whether he defends or not, cannot question the finding of title involved in the judgment.[5] But the judgment is conclusive against the vendor, though not notified of the suit, if he appears as a witness and testifies that he had no title at the date of his sale.[6] In all other cases, no judgment whereby a third party has recovered property from a vendee can be given in evidence to show want of title in the vendor, unless he was notified of the suit.[7] If a sheriff levies upon property and is sued by a claimant thereof, and in such suit the claimant is defeated, such judgment is conclusive against the claimant in a controversy between him and a person who derives title to the property through a sale made under such levy.[8]

[1] Derr *v.* Wilson, 84 Ky. 14; Strayer *v.* Johnson, 110 Pa. St. 21; Rio Grande etc. R. R. Co. *v.* Ortiz, 75 Tex. 602; Peterson *v.* Weissbein, 80 Cal. 38.

[2] Chase *v.* Kaynor, 78 Iowa, 449.

[3] Vose *v.* Morton, 4 Cush. 27; 50 Am. Dec. 750.

[4] Cooper *v.* Corbin, 105 Ill. 224.

[5] Thurston *v.* Spratt, 52 Me. 202; Gist *v.* Davis, 2 Hill Eq. 335; 29 Am. Dec. 89; Bender *v.* Fromberg, 4 Dall. 436; Hamilton *v.* Cutts, 4 Mass. 349; 3 Am. Dec. 222; Jennings *v.* Sheldon, 44 Mich. 92.

[6] Barney *v.* Dewey, 13 Johns. 224; 8 Am. Dec. 372.

[7] Stephens *v.* Jack, 3 Yerg. 403; 24 Am. Dec. 513; Jacob *v.* Pierce, 2 Rawle, 204; Axford *v.* Graham, 57 Mich. 422; Salle *v.* Light's Ex'rs, 4 Ala. 700; 39 Am. Dec. 317; Buchanan *v.* Kauffman, 65 Tex. 235; Fallon *v.* Murray, 16 Mo. 168.

[8] Prentiss *v.* Holbrook, 2 Mich. 372.

In South Carolina, after a very elaborate consideration of the question, it was determined that the right of a vendee to give notice to his vendor, and thus conclude him by the judgment, was limited to questions of title, and could not be extended to a case in which the quality of goods sold, and not the title thereto, was the question at issue.[1]

§ 187. **Warrantee and Warrantor.**—As the sale of personal property always involves a warranty of title, the rules and proceedings there applicable in fixing the liability of the vendor to his vendee, upon recovery of the property by some claimant, are also applicable to a vendor of real estate with a covenant of warranty of title, when he is sought to be made liable to his vendee, claiming to have been evicted under title paramount. Any judgment by which the warrantee is dispossessed, or his title adjudged invalid, if after proper notice to his warrantor, "is plenary evidence against the warrantor in a suit on the warranty,"[2] whether rendered in an action commenced against the covenantee, or by him commenced against another,[3] except that the warrantor may show that the prevailing party claimed title under the covenantee, or recovered on account of something occurring after the date of the covenant.[4] A warrantor sought to escape from the result of a judgment on the ground that the warrantee had been called as a witness by plaintiff at the trial. The court said: "There are authorities to the point that the record of a verdict and judgment cannot be used

[1] Smith *v.* Moore, 7 S. C. 209; 24 Am. Rep. 47.

[2] Hamilton *v.* Cutts, 4 Mass. 349; 3 Am. Dec. 222; Knapp *v.* Marlboro, 34 Vt. 235; Chamberlain *v.* Preble, 11 Allen, 370; Littleton *v.* Richardson, 34 N. H. 187; 66 Am. Dec. 759; Allen *v.* Rountree, 1 Speers, 80; Brewster *v.* Countryman, 12 Wend. 446; Smith *v.* Moore, 7 S. C. 209; 24 Am. Rep. 479; Ives *v.* Niles, 5 Watts, 323; Park *v.* Bates, 12 Vt. 381; 36 Am. Dec. 347; Booker *v.* Bell, 3 Bibb, 173; 6 Am. Dec. 641; Daskam *v.* Ullman, 74 Wis. 474; Marsh *v.* Smith, 73 Iowa, 295; Carpenter *v.* Pier, 30 Vt. 81; 73 Am. Dec. 288; Lord *v.* Cannon, 75 Ga. 300; Williamson *v.* Williamson, 71 Me. 442; Belden *v.* Seymour, 8 Conn. 304; 21 Am. Dec. 661.

[3] Brown *v.* Taylor, 16 Vt. 631; 37 Am. Dec. 618; Andrews *v.* Dennison, 16 N. H. 469; 43 Am. Dec. 565. *Contra*, Ferrell *v.* Alder, 8 Humph. 44.

[4] Davenport *v.* Muir, 3 J. J. Marsh. 310; 20 Am. Dec. 143; Chicago etc. R'y Co. *v.* Northern P. L., 70 Ill. 217.

in favor of one who, by his evidence, has contributed to their recovery. But this court is of opinion that this exception to the general rule defining the parties by whom evidence may be used would introduce an inconvenient collateral inquiry, and that no practical evil will result from maintaining the general rule unimpaired, and that it is important that the rules of evidence should be broad and well defined.[1] If a person guarantees anything, whether real or personal, to be of a specified quality or character, he may be brought in privity with an action, to which his guarantee is a party, involving the character or quality of the thing guaranteed. Thus a party selling a note, guaranteeing it to be valid, may be required to prosecute an action, in which a defense has been tendered, involving the validity of the note. If he neglects to do so, and the defense is successfully made, he may not, in a suit between himself and his vendee, show that the note was valid.[2] If the warrantor did not participate in the defense of the action and had no notice of its pendency, there are cases which imply that the judgment is nevertheless *prima facie* evidence against him, and imposes on him the burden of establishing his title.[3] The question has not been carefully considered. We think, however, that a judgment recovered under such circumstances, while it is admissible to show the eviction of the covenantee, does not relieve him of the burden of proving that such eviction was by title paramount.[4]

§ 188. **Parties not Obliged to Conduct Suit.** — It seems that there are cases where, although a party to a suit may have the right to recover over against another, yet he is not permitted to make such other person a party to the litigation. A, having left a note with a bank, afterward

[1] Griffin *v.* Reynolds, 17 How. 609.
[2] Carpenter *v.* Pier, 30 Vt. 81; 73 Am. Dec. 288.
[3] Collingwood *v.* Irwin, 3 Watts, 306; Tam *v.* Shaw, 10 Ind. 469.
[4] Ryerson *v.* Chapman, 66 Me. 557; Walton *v.* Carr, 67 Ind. 164; Knapp *v.* Marlboro, 31 Vt. 674; Everling *v.* Holcomb, 74 Iowa, 722; Booker *v.* Bell, 3 Bibb, 173; 6 Am. Dec. 641; King *v.* Kerr, 5 Ohio, 154; 22 Am. Dec. 777.

sued it for neglecting to give notice to the indorsers. This bank, claiming that the negligence was attributable to its cashier, notified him of the suit, and that he would be held responsible. He was offered the defense, but declined to undertake it. A recovered judgment. After this the bank sued its cashier for negligence. The judgment against the bank was treated as admissible evidence to show the fact and the amount of the recovery which had been had against plaintiffs, but not for any other purpose, because "this is not a case where recovery over had been given by law or provided by contract between the parties," and because the question whether the negligence was chargeable to the cashier, neither was nor could be litigated in the former suit.[1] A third party cannot be called upon to defend an action, where his showing himself not to be liable will not necessarily result in a judgment in favor of the party asking him to defend. Therefore where one sells personal property as called for by a bill of lading issued by a common carrier, and is then sued by his vendee on the ground of a deficiency in the quantity of such property, he cannot bind the carrier by the judgment by notifying it of the action and requesting it to defend, because no defense which it could possibly make could relieve him from the obligation of compensating his vendee for the deficiency in the goods sold.[2]

§ 189. **Not Bound by Assisting in the Suit.** — Unless a person is one of the real or nominal parties to the suit, or is so identified in interest with some of such parties that he is obliged to participate in the conduct of the proceedings if requested, he cannot be bound by the judgment. The fact that he managed the cause as agent[3] or attorney, or interested himself in it, and aided the prosecu-

[1] Bank of Owego *v.* Babcock, 5 Hill, 152.

[2] Garrison *v.* Babbage Trans. Co., 94 Mo. 130.

[3] Thrasher *v.* Haines, 2 N. H. 443; Breedlove *v.* Turner, 9 Mart. (La.) 353, 375.

tion or defense with or without any employment for either party, will not preclude him from impeaching the judgment.[1] Neither will his being present at the trial as a witness, though interested in the subject-matter of the controversy, bind him by the result.[2] Thus where A sued a sheriff for a horse levied upon as the property of B, and recovered judgment, B being present and testifying at the trial, it was held, in a subsequent suit by B against A for the same horse, that "it is of no consequence, *prima facie*, that the plaintiff was a witness for the defendant in the action brought by this defendant. He had no right, as a witness, to examine or cross-examine other witnesses, or to call other witnesses who might have better knowledge of the facts than himself. A mere witness has no control over a case whatever, and has no right to appeal. The plaintiff here was under no obligation, legal or moral, to defend for the sheriff, and he had no right to defend or to interfere."[3] Even an agreement between several persons, by which each was to be bound by a verdict, and to have the right to cross-examine the witnesses, was regarded as insufficient to make the judgment binding on any of the parties who would not have been bound by it in the absence of such agreement.[4]

§ 190. **Distributees of Common Fund.** — "The principle is well settled in respect to proceedings in chancery for the distribution of a common fund among the several parties in interest therein, either on application of the trustee of the fund, or of the administrator, legatee, or next of kin, or on the application of any party in interest, that an absent party who had no notice of the proceedings, and not guilty of willful laches or unreasonable neglect, will not be concluded by the decree of distribu-

[1] Allin *v.* Hall, 1 A. K. Marsh. 525; Brady *v.* Brady, 71 Ga. 71; Cannon R. A. *v.* Rogers, 42 Minn. 123; 18 Am. St. Rep. 497; Goodnow *v.* Litchfield, 63 Iowa, 275; Wilkie *v.* Howe, 27 Kan. 518; Hale *v.* Finch, 104 U. S. 261; Stryker *v.* Goodnow, 123 U. S. 527.

[2] Blackwood *v.* Brown, 32 Mich. 104.

[3] Yorks *v.* Steele, 50 Barb. 397.

[4] Patton *v.* Caldwell, 1 Dall. 419.

tion from the assertion of his right by bill or petition against the trustee, executor, or administrator; or, in case they have distributed the fund in pursuance of an order of the court, against the distributees."[1]

[1] Williams *v.* Gibbes, 17 How. 239; Matter of Howard, 9 Wall. 175.

# CHAPTER X.

## PERSONS BOUND BY LIS PENDENS.

§ 191. Reasons for law of.
§ 192. Law of, applies to suits at law and in equity.
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§ 202. Diligence in prosecution.
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§ 208. Involuntary transfers.
§ 209. Vendee of a vendee.
§ 210. Confined to state where property is situate.
§ 211. Attorney's lien.
§ 212. Statutes.
§ 213. Ejectment in California.
§ 214. Notice may be filed before the complaint.

§ 191. **Reasons for Law of Lis Pendens.** — Besides the parties named in a judgment or decree, many others are brought within its influence, and made to respect its commands and to abide by its settlements. Prominent among these parties are all those persons who have brought themselves within the principles involved in the law of *lis pendens*. The rules applied to third persons becoming interested in the subject-matter in litigation by acquiring the title of one of the parties to the controversy *pendente lite* have been explained and justified upon the assumption that those rules were based upon notice, actual or constructive. It has been said "that all people are sup-

posed to be attentive to what passes in courts of justice,"[1] and that, from being attentive, they must be informed of the various matters in process of litigation in those courts. But the more reasonable view is, that the law of *lis pendens* is not based upon presumptions of notice, but upon a public policy imperatively demanded by a necessity which can be met and overcome in no other manner.[2] "It is a careless use of language which has led judges to speak of it [*lis pendens*] as notice because it happens to have, in some instances, a similar effect with notice."[3] "The justice of the court would be wholly evaded by aliening the lands after subpœna served, and the suitor subject to great delay, expense, and inconvenience, without any certainty of at last securing his interest."[4] In fact, the doctrine of *lis pendens* as understood and enforced at common law does not seem to have required even such constructive notice as would in all cases put a man of ordinary sagacity on his guard, or as would have enabled him to ascertain whether the property in which he desired to acquire an interest was involved in litigation. The commencement of *lis pendens* dated from the service of the subpœna, though it was not returnable until the next term. No *lis pendens* existed until the bill was filed, yet the filing being made, the *lis pendens*, by relation, was considered as in force from the service of the subpœna. Under such a system, it might frequently happen that a man would be bound by a suit whose object he could only conjecture, no means of information being accessible. That every man should be presumed to be present in the courts and attentive to their proceedings, is a most unnatural presumption, — a fiction not merely improbable, but impossible, since by no human power can one man

[1] Worsley *v.* Earl of Scarborough, 3 Atk. 392; Green *v.* White, 7 Blackf. 242.

[2] Newman *v.* Chapman, 2 Rand. 98; 14 Am. Dec. 766; Bellamy *v.* Sabine, 1 De Gex & J. 566; Dovey's Appeal, 97 Pa. St. 153; Houston *v.* Timmerman, 17 Or. 499; 11 Am. St. Rep. 848.

[3] Watson *v.* Wilson, 2 Dana, 406; 26 Am. Dec. 459.

[4] Ludlow's Heirs *v.* Kidd's Ex'r, 3 Ohio, 541.

be at all times in attendance upon the several tribunals of his country in which claims to specific property are determined. But the necessity of the rules of *lis pendens* is so apparent and so unavoidable that the early existence and continued application of these rules were indispensable to a wise public policy. If during the pendency of any action at law or in equity the claim to the property in controversy could be transferred from the parties to the suit so as to pass to a third party, unaffected either by the prior proceedings or the subsequent result of the litigation, then all transactions in our courts of justice would, as against men of ordinary forethought, prove mere idle ceremonies. A series of alienations protracted into the boundless future would forever preclude the prevailing party from obtaining that to which he had vindicated his claim.

The necessity of *lis pendens* and the perils which it was designed to avert were thus forcibly stated by Chancellor Kent in a case which is regarded as a pioneer in the United States on the subject on which it treats, and which enjoys the distinction of being quoted and approved in every part of our country: "The counsel for the defendants have made loud complaints of the injustice of the rule, but the complaint was not properly addressed to me; for if it is a well-settled rule, I am bound to apply it, and it is not in my power to dispense with it. I have no doubt the rule will sometimes operate with hardship upon a purchaser without actual notice; but this seems to be one of the cases in which private mischief must yield to general convenience, and most probably the necessity of such a hard application of the rule will not arise in one out of a thousand instances. On the other hand, we may be assured the rule would not have existed, and have been supported for centuries, if it had not been founded in great public utility. Without it, as has been observed in some of the cases, a man, upon the service of a subpœna, might alienate his lands, and prevent the justice of the

court. Its decrees might be wholly evaded. In this very case the trustee had been charged with a gross breach of his trust, and had been enjoined by the process of the court, six months before the sale in question, from any further sales. If his subsequent sales are to be held valid, what temptation is held out to waste the trust property, and destroy all the hopes and interests of the *cestui que trust!* A suit in chancery is, in such cases, necessarily tedious and expensive, and years may elapse, as in this case, before the suit can be brought to a final conclusion. If the property is to remain all this time subject to his disposition in spite of the efforts of the court to prevent it, the rights of that helpless portion of the community whose property is most frequently held in trust will be put in extreme jeopardy. To bring home to every purchaser the charge of actual notice of the suit must from the very nature of the case be in a great degree impracticable."[1]

§ 192. **Is a Rule both at Law and in Equity.** — In the case of *King* v. *Bill*, 28 Conn. 593, the statement is made that *lis pendens* is a purely equitable rule, recognizable only in equity. This case is, however, chiefly, if not exclusively, remarkable for the clearness and precision with which it misstates the law of *lis pendens*. It has no force as an authority, being overruled by the case of *Newton* v. *Birge*, 35 Conn. 250. According to the opinion of Lord Justice Turner, "that this doctrine belongs to a court of

[1] Murray *v.* Ballou, 1 Johns. Ch. 566, decided in 1815. To show that *lis pendens* was then old and well established in our law, the chancellor quoted the ordinance of Lord Bacon, that "no decree bindeth any that cometh in *bona fide*, by conveyance from the defendant, before the bill exhibited, and is made no party, neither by bill nor order; but where he comes in *pendente lite*, and while the suit is in full prosecution, and without any color of allowance or privity of the court, there regularly the decree bindeth"; and cited the cases of Martin *v.* Stikes, 1 Cas. Ch. 150; Culpepper *v.* Anstin, 2 Ch. Cas. 115; Garth *v.* Ward, 2 Atk. 174; Preston *v.* Tubbin, 1 Vern. 286; Sorrell *v.* Carpenter, 2 P. Wms. 482; Anonymous, 1 Vern. 318; Finch *v.* Newnham, 2 Vern. 216; Walker *v.* Smalwood, Amb. 676; Bishop of Winchester *v.* Paine, 11 Ves. 194. For a very similar view of *lis pendens*, see Bellamy *v.* Sabine, 1 De Gex & J. 566, decided in 1857; also Haughwout *v.* Murphy, 22 N. J. Eq. 544; Metcalfe *v.* Pulvertoft, 2 Ves. & B. 205.

law, no less than to courts of equity, appears from a passage in 2 Institutes, 375, where Lord Coke, referring to an alienation by a mesne lord pending a writ, says that the alienee could not take advantage of a particular statute of Westminster, because he came to the mesnalty *pendente brevi*, and in judgment of law the mesne *as to the plaintiff* remains seised of the mesnalty, for *pendente lite nihil innovetur*."[1] In truth, this doctrine seems to prevail with respect to judicial proceedings of every character, and is therefore applicable to proceedings to condemn lands,[2] to contest the validity of wills,[3] to seize and administer the estates of bankrupts,[4] and to foreclose all kinds of liens.[5] In many of the states statutes have been passed in which the doctrine of *lis pendens* is regulated and limited. These statutes are believed not to apply to actions in the federal courts of the state, unless adopted by the rules of those courts, and particularly not to apply to suits in equity in those courts, unless so adopted.[6]

§ 193. **Transfers Pendente Lite cannot Prejudice Suit.** — It is now a universally recognized rule of law that no alienation or transfer of the subject-matter of the controversy, made while the suit is being prosecuted with due diligence, need be noticed by the parties to the action. Such alienation, though valid between the parties thereto, is void as against the judgment or decree finally rendered in the suit.[7]

[1] Bellamy *v.* Sabine, 1 De Gex & J. 584; Secombe *v.* Steele, 20 How. 94.

[2] Plummer *v.* Wausaw B. Co., 49 Wis. 449; Roach *v.* Riverside W. Co., 74 Cal. 263.

[3] McIlwrath *v.* Hollander, 73 Mo. 105; 39 Am. Rep. 484.

[4] Kimberling *v.* Hartley, 1 McCrary, 136.

[5] Wagner *v.* Smith, 13 Lea, 560; Wilson *v.* Wright, 72 Ga. 848.

[6] Majors *v.* Cowell, 51 Cal. 481.

[7] Moons *v.* Crowder, 72 Ala. 79; Norton *v.* Birge, 35 Conn. 250; Bayer *v.* Cockerill, 3 Kan. 282; Lee *v.* Salinas, 15 Tex. 495; Meux *v.* Anthony, 12 Ark. 411; Shotwell *v.* Lawson, 30 Miss. 27; 64 Am. Dec. 145; Walden *v.* Bodley's Heirs, 9 How. 34; Copenheaver *v.* Huffaker, 6 B. Mon. 18; Jackson *v.* Warren, 32 Ill. 331; Loomis *v.* Riley, 24 Ill. 307; Inloe's Lessee *v.* Harvey, 11 Md. 519; Sharp *v.* Lumley, 34 Cal. 611; Barelli *v.* Delassus, 16 La. Ann. 280; Calderwood *v.* Tevis, 23 Cal. 335; Horn *v.* Jones, 28 Cal. 194; Montgomery *v.* Byers, 21 Cal. 107; Boulden *v.* Lanahan, 29 Md. 200; Hurlbutt *v.* Butenop, 27 Cal. 50; Truitt *v.* Truitt, 38 Ind. 16; Commonwealth *v.* Dieffenbach, 3 Grant Cas. 368; Hughes *v.* Whitaker, 4 Heisk.

*Lis pendens* is often spoken of as operating as constructive notice of the suit, and of the material allegations of the pleadings therein;[1] but its real effect is much greater than that of mere notice. It has the effect to bring the subject-matter of the litigation within the control of the court, and to render the parties powerless to place it beyond the power of the final judgment. If any one acquires any interest *pendente lite*, no notice need be taken of him or his acquisition. He need not be made a formal party in any way. Nevertheless, the judgment, when rendered, must be given the same effect as if he had not acquired his interest, or as if he had been a party before the court from the commencement of the proceeding. His interests are absolutely concluded by the final determination of the suit;[2] and this is true, whether the transfer to him is voluntary, or he has undertaken to secure, *pendente lite*, an attachment or execution lien, or to acquire

399; Walker *v.* Douglas, 89 Ill. 425; Snowman *v.* Harford, 62 Me. 434; Tilton *v.* Cofield, 93 U. S. 163; Jackson *v.* Andrews, 7 Wend. 152; 22 Am. Dec. 574; Smith *v.* Crocker, 65 Ga. 461; Whitney *v.* Higgins, 10 Cal. 547; 70 Am. Dec. 748; Le Roy *v.* Rogers, 30 Cal. 229; 89 Am. Dec. 88. The rule is as applicable to encumbrancers as to purchasers: Youngman *v.* Elmira R. R. Co., 65 Pa. St. 278; Masson *v.* Saloy, 12 La. Ann. 776; and affects purchasers at sheriff's sale to the same extent as if the alienation was voluntary: Fash *v.* Ravesies, 32 Ala. 451; Steele *v.* Taylor, 1 Minn. 274; Hall *v.* Jack, 32 Md. 253; Hersey *v.* Turbett, 27 Pa. St. 418; Cooley *v.* Brayton, 16 Iowa, 10; Hart *v.* Marshall, 4 Minn. 294; Crooker *v.* Crooker, 57 Me. 395; Berry *v.* Whitaker, 58 Me. 422. In McPherson *v.* Housel, 13 N. J. Eq. 299, it was decided that the vendee of the defendant in a forelosure suit takes the property subject to all costs which may be made in the case, including those occasioned by an appeal prosecuted by the defendant subsequently to his conveyance.

[1] Tredway *v.* McDonald, 51 Iowa, 663; Meyer *v.* Portis, 45 Ark. 420; Union T. Co. *v.* Southern In. Nav. Co., 130 U. S. 565; Randall *v.* Duff, 79 Cal. 115; Jackson *v.* Dickinson, 15 Johns. 309; 8 Am. Dec. 236; Woodfolk *v.* Blount, 2 Hayw. (Tenn.) 147; 9 Am. Dec. 736.

[2] Union T. Co. *v.* Southern In. Nav. Co., 130 U. S. 565; Kellar *v.* Stanley, 86 Ky. 240; Jones *v.* McNarrin, 68 Me. 334; 28 Am. Rep. 66; Snowden *v.* Craig, 26 Iowa, 156; 96 Am. Dec. 125; Evans *v.* Welborne, 74 Tex. 530; 15 Am. St. Rep. 858; Stevenson *v.* Edwards, 98 Mo. 622; Roach *v.* Riverside W. Co., 74 Cal. 263; Shelton *v.* Johnson, 4 Sneed, 672; 70 Am. Dec. 265; Pickett *v.* Ferguson, 45 Ark. 177; 55 Am. Rep. 545; Jackson *v.* Andrews, 7 Wend. 152; 22 Am. Dec. 574; Mellen *v.* Moline M. I. W., 131 U. S. 352; Powell *v.* Williams, 14 Ala. 476; 48 Am. Dec. 105; Gould *v.* Hendrickson, 96 Ill. 599; Galbreath *v.* Estes, 38 Ark. 599; Welton *v.* Cook, 61 Cal. 481; Edwards *v.* Norton, 55 Tex. 405; Ray *v.* Roe, 2 Blackf. 258; 18 Am. Dec. 159; Murray *v.* Blatchford, 1 Wend. 583; 19 Am. Dec. 537; Briscoe *v.* Bonaugh, 1 Tex. 326; 46 Am. Dec. 108; Portes *v.* Hill, 30 Tex. 529; 98 Am. Dec. 481.

title by an execution or judicial sale.[1] Jurisdiction over the subject-matter is always essential. In its absence, no effect can be given to proceedings though they purport to be judicial, for in law they are extrajudicial. Hence if the petition or complaint does not disclose a subject-matter within the jurisdiction of the court, "the proceedings cannot operate as a *lis pendens*, even from the date of the service of process."[2]

§ 194. **Property Bound by.** — Courts have occasionally exhibited a reluctance in applying the doctrines of *lis pendens* to any property other than real estate. And it has been said that at least no movable personal property, to which possession constitutes the chief evidence of title, is bound by the suit, in the hands of a *bona fide* purchaser without notice; but "it may be conceded that at this day *lis pendens* applies with equal force to controversies in regard to personal property."[3] Choses in action, including

[1] Thoms v. Southard, 2 Dana, 475; 26 Am. Dec. 467; Rider *v.* Kelso, 53 Iowa, 367; Kimberling *v.* Hartley, 1 McCrary, 136; Northern Bank *v.* Deckebach, 83 Ky. 154.

[2] Jones *v.* Lusk, 2 Met. (Ky.) 356; Benton *v.* Shafer, 47 Ohio, 129; Pearson *v.* Keedy, 6 B. Mon. 128; 43 Am. Dec. 160.

[3] Swantz *v.* Pillow, 50 Ark. 300; 7 Am. St. Rep. 98; Carr *v.* Lewis Coal Co., 15 Mo. App. 551; McCutchen *v.* Miller, 31 Miss. 65; Tabb *v.* Williams, 4 Jones Eq. 352; Murray *v.* Ballou, 1 Johns. Ch. 566. For application to negotiable notes past due, see Kellogg *v.* Fancher, 23 Wis. 21; 99 Am. Dec. 96; to purchase of a patent pending litigation, to have it declared void: Tyler *v.* Hyde, 2 Blatchf. 308; to suit to subject bank stock to a certain trust: Leitch *v.* Wells, 48 Barb. 637; to creditor's bill to reach furniture: Scudder *v.* Van Amburgh, 4 Edw. Ch. 29; to railroad bonds in Pennsylvania, where such bonds, contrary to the decisions in other states, are held non-negotiable: Diamond *v.* Lawrence County, 37 Pa. St. 353; 78 Am. Dec. 429. See, however, Chase *v.* Searles, 45 N. H. 511, where the application of *lis pendens* to personalty seems to be doubted in general, and to be altogether denied as to personal property sought to be made available to the satisfaction of a judgment by means of a creditor's bill. The case of Leitch *v.* Wells, referred to in this note, has been reversed upon appeal. Three of the commissioners of appeals by whom the case was decided wrote separate opinions, each assigning somewhat different grounds from those urged by his brethren for the reversal. Upon the question whether the property in controversy was of such a nature that it could be bound by *lis pendens*, Commissioner Earl wrote as follows: "Since the decision of McNeil *v.* Tenth National Bank, 46 N. Y. 325, 7 Am. Rep. 341, certificates of stock with blank assignments and powers of attorney attached must be nearly as negotiable as commercial paper. The doctrine of constructive *lis pendens* has never yet been applied to such property. This doctrine must have its limitations. It could not be applied to ordinary commercial paper, nor to bills of lading, nor to government or corporate bonds payable to bearer. Indeed, I do not find that it has ever been applied, and I do not think it ought to be applied,

negotiable paper past due, are subject to the doctrine of *lis pendens;*[1] in fact, the only property not so subject is negotiable paper not past due.[2] When such paper is the subject of the suit, the court ought to require it to be brought into court, or so placed that the defendant cannot commit a fraud upon the law by making the judgment unavailable.[3] Every consideration of necessity and of public policy which demands and justifies the law of *lis pendens* as applied to real estate also demands and justifies the application of the same law to personal property. In fact, the ease with which personalty could be transferred to parties having no notice of the litigation is much greater than in the case of real estate. The probability of the defendant's entirely defeating the object of the suit by a transfer of the property *pendente lite* is rather greater in the case of personal than of real estate, and the necessity of some law prohibiting such transfer, to the prejudice of the prevailing party, is therefore greater in the former case than in the latter. But the necessity of preserving the negotiable character of negotiable paper not due, so as to require no inquiry beyond inspection of the paper itself in relation to its ownership, has properly been considered paramount to the necessity of avoiding transfers *pendente lite,* and that class of paper, therefore, is the only property not liable to be affected by the doctrine of *lis pendens.*

§ 195. **Commencement.** — *Lis pendens* began, by the common law, at the *teste* of the writ,[4] and in chancery on the service of the subpœna, and not before,[5] and the de-

to any of the ordinary articles of commerce. Public policy does not require that it should be thus applied. On the contrary, its application to such property would work great mischief, and lead to great embarrassments": Leitch *v.* Wells, 48 N. Y. 613.

[1] Diamond *v.* Lawrence County, 37 Pa. St. 353; 78 Am. Dec. 429.

[2] Winston *v.* Westfeldt, 22 Ala. 760; 58 Am. Dec. 278; Mims *v.* West. 38 Ga. 18; 95 Am. Dec. 379; Day *v.* Zimmerman, 68 Pa. St. 72; 8 Am. Rep. 157; Kellogg *v.* Fancher, 23 Wis. 21; 99 Am. Dec. 96; Mayberry *v.* Morris, 62 Ala. 132.

[3] Stone *v.* Elliott, 11 Ohio, 252; Keiffer *v.* Ehler, 18 Pa. St. 388.

[4] Newman *v.* Chapman, 2 Rand. 93; 14 Am. Dec. 766.

[5] Wickliffe *v.* Breckinridge, 1 Bush, 443; Miller *v.* Sherry, 2 Wall. 237; Waring *v.* Waring, 7 Abb. Pr. 472; Goodwin *v.* McGehee, 15 Ala. 232.

fendant had no power to give it effect at an earlier day by the acceptance of the service of the subpœna as of a date prior to that of its actual service.[1] It is also necessary that the bill be filed, but upon such filing the *lis pendens* begins from the service of the subpœna.[2] In Wisconsin, under the code, a summons and complaint in a proceeding to obtain an injunction may be served before either is filed in court. Property intended to be affected by such a proceeding, having been transferred *bona fide* without notice, after service on the defendant, but before filing the papers in court, it was held that the doctrine of *lis pendens* ought not to be applied, where there was no record of the suit, although the process had been served; that while there is no hardship in requiring purchasers to examine the records of the county, there is a manifest hardship in requiring them to take notice of that which no examination, however patient and industrious, could reveal, and that no case exists, under the code, enforcing *lis pendens* before papers are filed, and none ought to exist.[3]

The doctrine that upon the filing of a bill or complaint the *lis pendens* takes effect at an anterior date corresponding with the date of the service of the subpœna has been most emphatically repudiated. This doctrine is based upon an anonymous case decided in 1685, and re-

Allen *v.* Mandaville, 26 Miss. 397; Butler *v.* Tomlinson, 38 Barb. 641; Edwards *v.* Banksmith, 35 Ga. 213; Herrington *v.* Herrington, 27 Mo. 560; Lyle *v.* Bradford, 7 T. B. Mon. 115; Haughwout *v.* Murphy, 22 N. J. Eq. 545; Powell *v.* Wright, 7 Beav. 444; Jackson *v.* Dickenson, 15 Johns. 309; 8 Am. Dec. 236; Campbell's Case, 2 Bland, 209; 20 Am. Dec. 360; Murray *v.* Blatchford, 1 Wend. 583; 19 Am. Dec. 537; Scott *v.* McMillan, 1 Litt. 302; 13 Am. Dec. 239; Majors *v.* Cowell, 51 Cal. 478; Stone *v.* Tyree, 30 W. Va. 687; Staples *v.* White, 88 Tenn. 30; Union T. Co. *v.* Southern In. N. Co., 130 U. S. 565; Sanders *v.* McDonald, 63 Md. 503; Grant *v.* Bennett, 96 Ill. 513.

[1] Miller *v.* Kershaw, 1 Bail. Eq 479; 23 Am. Dec. 183. The fact that a copy of the bill was read to one defendant by another cannot put in operation the law of *lis pendens* before the subpœna is served: Williamson *v.* Williams, 11 Lea, 355.

[2] Anonymous, 1 Vern. 318; Sugden on Vendors, 1045.

[3] Kellogg *v.* Fancher, 23 Wis. 21; 99 Am. Dec. 96. And an order to file a complaint *nunc pro tunc* as of the day when the notice of action was filed will not make the *lis pendens* operative against a purchaser after the filing of the notice, and before the filing of the complaint: Weeks *v.* Tomes, 16 Hun, 349.

ported in 1 Vernon, 318. This case, it is claimed, has never been affirmed or approved in any manner, in the almost two centuries of time intervening since its decision. But on the other hand it may also be claimed to have stood during that long period of time without being, until very recently, made the subject of judicial dissent. The following are the views of Mr. Commissioner Earl, expressed in the case of *Leitch* v. *Wells*, and sanctioned by the judgment entered in that case by the commission of appeals of the state of New York: "Suits in equity may now be commenced by the service of the summons alone; but it would be quite monstrous to hold that the suit shall be deemed pending from the time of such service, so as to be 'constructive notice' to all the people of the state of its pendency. No record is kept of the issuing of the summons, and it is not required to be filed. It may be issued by any one of several thousand lawyers in the state, or by any one of several hundred thousand persons in the state competent to be plaintiffs in a suit, and it might not be possible for a stranger to the suit, by any degree of deligence, to learn that it had been issued or served; and if he did perchance learn of it, it would give him no notice whatever of the subject-matter of the litigation. If, therefore, the mere service of a summons should be *lis pendens*, so as to bind strangers, it would introduce great uncertainty and embarrassment into transactions in reference to personal property, provided the rule of *lis pendens* were extended as broadly as claimed for the plaintiffs in this case. I therefore hold that there is no *lis pendens*, so as to give constructive notice to strangers, until a summons had been served, and a complaint, distinctly stating the subject of the litigation, and specifying the claim made, has been filed in the proper clerk's office. The rule as thus stated is sufficiently hard and unreasonable."[1] Similar views prevail in Wiscon-

[1] Leitch *v.* Wells, 48 N. Y. 611. In the earlier case of Hayden *v.* Bucklin, this case it seems to be assumed that 9 Paige, 513, was inconsistent with

sin[1] and Kansas; and in the latter state though the complaint is presented for filing and indorsed as filed, yet if it is withdrawn from the clerk's office so that it cannot be seen and examined there, the operation of the law of *lis pendens* is thereby suspended.[2]

The constructive service of process, when authorized by law, is equivalent to its personal service. Whenever the service may be made by publication, the *lis pendens* is complete upon the actual publication of the notice for defendant to appear;[3] but it seems that there is no *lis pendens* until the order for publication is fully executed.[4] Where a defective subpœna was served, and afterwards the service was set aside, and the subpœna amended so as to bear date the day the service was set aside, it was held that *lis pendens* did not begin until service of the amended subpœna.[5]

§ 196. **Specific Property must be Affected.** — To determine whether an action or proceeding will put in operation the doctrine of *lis pendens*, one must inquire whether its object is to affect specific property or not. If the relief sought includes the recovery of possession, or the enforcement of a lien, or the cancellation or creation of a muniment of title, or any other judicial action affecting the title, possession, or right of possession of specific property, real or personal, then there is or may be a *lis pendens* sufficient to bind all subsequent purchasers or encumbrancers.[6] If, on the other hand, no specific property is to be affected by the judgment, there is no *lis pendens*.

the decision reported in 1 Vernon. But Chancellor Walworth instead of doubting the case in 1 Vernon, cited it, and also similar case of Moor *v.* Welsh Copper Co., 1 Eq. Cas. Abr. 39, with apparent approbation.

[1] Sherman *v.* Bemis, 58 Wis. 343; Dawson *v.* Mead, 71 Wis. 295.

[2] Wilkinson *v.* Elliott, 43 Kan. 590; 19 Am. St. Rep. 158.

[3] Chandron *v.* Magee, 8 Ala. 570; Bennet's Lessee *v.* Williams, 5 Ohio, 461; Hayden *v.* Bucklin, 9 Paige, 511.

[4] Clevinger *v.* Hill, 4 Bibb, 498; Carter *v.* Mills, 30 Mo. 432; Cassidy *v.* Kluge, 73 Tex. 154.

[5] Allen *v.* Case, 13 Wis. 621.

[6] Rosenheim *v.* Harstock, 90 Mo. 357; Chaffe *v.* Patterson, 61 Miss. 28; Houston *v.* Timmerman, 17 Or. 499; 11 Am. St. Rep. 848; O'Brien *v.* Putney, 55 Iowa, 292; Spencer *v.* Credle, 102 N. C. 68.

Hence if the object of the action is merely to recover a money judgment, there can be no *lis pendens*,[1] though the cause of action may arise out of property specified in the petition or complaint, as where the suit is to recover the value of such property or compensation for injuries thereto.[2]

A suit for divorce and for alimony and the division of common or other property may or may not operate as a *lis pendens*. If the complaint does not designate particular property, and seek to subject it to the satisfaction of the wife's claims, or to have it set aside as hers or for her use, she is not entitled to the benefit of the rules of *lis pendens*, because her suit does not apply to any specified part of the husband's estate, real or personal.[3] The judgment which may be obtained may, from the docketing thereof, constitute a lien on certain property; but in this as well as in all other respects it no more constitutes a *lis pendens*, or a claim to particular estate, than a suit upon a promissory note or any other sufficient cause of action. It is not sufficient that the judgment, unless otherwise paid, will be satisfied out of the sale of certain real estate, unless its sale is directed by the judgment as part of the relief sought by the complaint. If, on the other hand, the pleadings in a suit for divorce describe specific property in respect to which relief is sought, either by making it chargeable with the payment of alimony, or setting it apart for the use of or as the property of one of the parties, or of partitioning or dividing it between them, the doctrines of *lis pendens* apply.[4]

§ 197. **Property must be Pointed out.** — It is further essential to the existence of *lis pendens* that the particular

[1] St. Joseph Mfg. Co. *v.* Daggett, 84 Ill. 556; Ray *v.* Roe, 2 Blackf. 258; 18 Am. Dec. 159; White *v.* Perry, 14 W. Va. 66.

[2] Gardner *v.* Peekham, 13 R. I. 102.

[3] Brightman *v.* Brightman, 1 R. I. 112; Hamlin *v.* Bevans, 7 Ohio, 161; 28 Am. Dec. 625; Feigley *v.* Feigley, 7 Md. 537; 61 Am. Dec. 375; Scott *v.* Rogers, 77 Iowa. 483.

[4] Wilkinson *v.* Elliott, 43 Kan. 590; 19 Am. St. Rep. 158; Powell *v.* Campbell, 20 Nev. 232; 19 Am. St. Rep. 350; Daniel *v.* Hodges, 87 N. C. 95; Tolerton *v.* Williard, 30 Ohio St. 579; Sapp *v.* Wightman, 103 Ill. 150.

property involved in the suit "be so pointed out by the proceedings as to warn the whole world that they intermeddle at their peril."[1] Therefore a suit against a corporation to forfeit its charter,[2] or against its directors to compel them to perform their duties,[3] in which no property is described, does not affect *pendente lite* purchasers. Where a suit was, among other things, to restrain a trustee from "selling any more of the trust negroes," it was held not to affect the purchaser of a negress, because there was nothing calling attention to her in the bill as the identical property in litigation.[4] Hence a general bill for an account of real or of real and personal estate does not create such a *lis pendens* as will affect a purchaser, but the rule is otherwise when it is sought to charge a particular estate with a particular trust.[5] In a leading case it was said that a bill "must be so definite in the description that any one reading it can learn thereby what property is intended to be made the subject of litigation."[6] But as it is also stated in the same opinion that it was evident that the pleader in the original case did not have in his mind the property sought to be affected by *lis pendens*, the language of the court is probably to be construed as applicable only to those cases in which there is nothing to put a purchaser upon inquiry, and not to the cases where the pleadings, though sufficient to put a purchaser on his guard, do not in themselves contain a particular designation of the property in controversy. In a case where, by the decision of Chancellor Kent, a purchaser was held to be bound, the property described in the bill was "divers lands in Crosby's manor," held in trust for the plaintiff by the defendant, Winter. The chancellor said: "It is true, there might have been 'divers' lands in 'Crosby's manor' held in trust by Winter, and yet the

[1] Russell *v.* Kirkbride, 62 Tex. 455.
[2] Havemeyer *v.* Superior Court, 84 Cal. 327; 18 Am. St. Rep. 192.
[3] Paine *v.* Root, 121 Ill. 77.
[4] Lewis *v.* Mew, 1 Strob. Eq. 180; Jones *v.* McNarrin, 68 Me. 334; 28 Am. Rep. 66.
[5] Sugden on Vendors, 1045.
[6] Miller *v.* Sherry, 2 Wall. 237; Low *v.* Pratt, 53 Ill. 438.

lots sold to defendant have been held by him in his own absolute right. But though this was a possible it was an improbable fact; and if ever a bill contained sufficient matter to put a party upon inquiry, the bill in 1809 answered that purpose. The doctrine of *lis pendens* is indispensable to right and justice, in the cases and under the limitations in which it has been applied; and according to the observations of Lord Chancellor Manners we must not suffer the rule to be frittered away by exceptions. Was it too much to have required of a purchaser charged with notice of all the facts in the bill to have called upon Winter to discover the source of his title? The general rule is, that what is sufficient to put the party upon inquiry is good notice in equity. The least inquiry even of Winter himself would have satisfied the purchaser that the lots he purchased were parcel of the trust lands mentioned in the bill."[1] From this decision, which seems to be sustained by reason, it would follow that the description in the bill need not, in itself, be so specific as to necessarily and beyond all possibility include a given tract of land; but that it is ample, for the purpose of invoking the rule of *lis pendens*, if the land in all probability comes within the description, and if prospective purchasers, upon reading the bill, are advised by it that the land with which they propose to meddle may be, and probably is, a parcel of the lands in litigation.

§ 198. **"Lis Pendens is Notice of Every Fact Contained in the Pleadings** which is pertinent to the trial of the matter put in issue by them; and, in a chancery case, of the contents of exhibits to the bill which are produced and proved."[2] Constructive notice of matters not in issue, and not pertinent to any issue, and which therefore cannot be determined in the action or proceeding, cannot be given by mentioning them in any pleading or

[1] Green *v.* Stayter, 4 Johns. Ch. 39. 743; Moore *v.* Hershey, 90 Pa. St.
[2] Center *v.* P. & M. Bank, 22 Ala. 196.

other paper.[1] So an action to determine the title to a mortgage cannot affect parties who purchased the land subject to such mortgage.[2]

*Lis pendens* does not affect any property not necessarily bound by the suit. Thus if money is secured upon an estate, no litigation about that money, but not about the estate, can affect a purchaser of the estate.[3] *Lis pendens* is notice of all facts apparent on the face of the pleadings, and of those other facts of which the facts so stated necessarily put the purchaser on inquiry;[4] but it is not notice of every "equity which by possibility can arise out of the matters in question in the suit."[5]

§ 199. **Amendments.** — It is further necessary, in order to conclude a purchaser by virtue of a judgment, that by the record in the case at the time of the purchase the parties to the suit and the nature of the claim made to the property should be so stated that no subsequent amendment will be necessary. If any amendment is made, *lis pendens* as to the matters and parties involved in the amendment dates from the time it is made. The amending of a bill to show a new equity creates a new *lis pendens*. Thus where property was sought to be subjected to the payment of plaintiff's demands upon one ground, and that ground becoming untenable, the bill was amended to show another equity, upon which plaintiff prevailed in the suit, a purchaser preceding the amendment was held not to be bound by the decree.[6] The decisions in Ohio have established an exception to this rule. A bill was filed to subject lands to the payment of a judgment, which was subsequently reversed and a new trial

[1] Page *v.* Waring, 76 N. Y. 463; Weiler *v.* Dreyfus, 26 Fed. Rep. 824.

[2] Green *v.* Rick, 121 Pa. St. 130; 6 Am. St. Rep. 760.

[3] Worsley *v.* Earl of Scarborough, 3 Atk. 392.

[4] Jones *v.* McNarrin, 68 Me. 334; 28 Am. Rep. 66; Lockwood *v.* Bates, 1 Del. Ch. 435; 12 Am. Dec. 121.

[5] Shalcross *v.* Dixon, 7 L. J. Ch., N. S., 180.

[6] Stone *v.* Connelly, 1 Met. (Ky.) 652; 71 Am. Dec. 499; Jones *v.* Lusk, 2 Met. (Ky.) 356; Clarkson *v.* Morgan, 6 B. Mon. 441; Wortham *v.* Boyd, 66 Tex. 401; Holland *v.* Citizens' S. B., 19 Atl. Rep. 654 (R. I.).

ordered. Upon the new trial the plaintiff again recovered. He then filed his supplemental bill, showing the new judgment, and asking that the same lands be subjected to its payment. A question afterward arising whether the lands were bound by *lis pendens* prior to the filing of the supplemental bill, the court said: "It is assumed that when the right to recover in the bill in equity was taken away by the reversal of the judgment, the suit ceased to be pending, so far as to bind the property. We are not satisfied that this position is a sound one. No such distinction is to be found in the books. But the doctrine seems plain that by the institution of a suit the subject of litigation is placed beyond the powers of the parties to it; that whilst the suit continues in court, it holds the property to respond to the final judgment or decree. The supplemental bill was ingrafted into the original bill and becomes identified with it. The whole was a *lis pendens*, effectually preventing an intermediate alienation." [1]

The introduction of new parties is, as to those parties and their grantees, a new *lis pendens*, to which, under a statute requiring the filing of a notice, a new notice is indispensable.[2] If a bill of review sets up matter not in issue in the original suit, then all parties coming in after the original suit are not bound by the bill of review unless made parties to it.[3] There can be no doubt that the alienee of the plaintiff is as much bound by the judgment as the alienee of the defendant.[4] But it does not seem to be essential to the binding of the plaintiff's vendee that at the time of the transfer the defendant should have disclosed his defense or his claim to affirmative relief.[5]

[1] Stoddard *v.* Myers, 8 Ohio, 203; affirmed in Gibbon *v.* Dougherty, 10 Ohio St. 365, on the ground that the substantial object of the suit was at all times the same; and that reversal of the judgment for an irregularity was neither an extinguishment nor a release of plaintiff's rights.

[2] Curtis *v.* Hitchcock, 10 Paige, 399; Marchbanks *v.* Banks, 44 Ark. 48.

[3] Debell *v.* Foxworthy's Heirs, 9 B. Mon. 228.

[4] Bellamy *v.* Sabine, 1 De Gex & J. 580.

[5] Hall L. C. *v.* Gustin, 54 Mich. 624.

Thus a mortgagor, having a power authorizing him to sell the premises to pay his debt, commenced a suit to foreclose, to which he made A and B, junior mortgagees, parties, and subsequently sold the lands under his power of sale to C. After such sale, A and B filed their cross-bill. Upon these facts it was decided that the institution of the suit created a *lis pendens* against the plaintiff, and gave the junior mortgagees the right to litigate their claims against him connected with the mortgage; that this right could not be divested by means of any subsequent sale or transfer made to a third party; and that plaintiff could not lull A and B into security by tendering them an opportunity of controverting his claims, and then, by having recourse to his power of sale, avoid their equities.

§ 200. **Co-plaintiffs and Co-defendants.** — The doctrine of *lis pendens*, not being founded upon any of the peculiar tenets of a court of equity as to implied or constructive notice, but being a doctrine common to the courts, both of law and of equity, and resting "upon this foundation, that it would plainly be impossible that any action or suit could be brought to a successful termination if alienation *pendente lite* were permitted to prevail," should not be carried any further than is necessary to answer the purposes which called it into being. The doctrine of *lis pendens* must therefore be restrained within its proper sphere, and not so enlarged as to produce results not at all essential to the carrying the judgment or decree into complete effect. Thus if in an action by one plaintiff against two or more defendants it appears from the pleadings that one of the defendants has certain equities against the others, but those equities do not in any way affect the present litigation between plaintiff and the defendants, and the rights of the defendants between each other are not sought to be determined, no *lis pendens* can be created beyond the purposes of the suit, and an alienee

of one of the defendants is not charged with implied notice of the equities between the co-defendants.[1] It would seem to be perfectly clear, in the absence of all authority upon the subject, that there could be no *lis pendens* between co-plaintiffs or co-defendants in any action not designed to settle the rights of such plaintiffs or defendants between each other, no matter how many facts, not material to the present controversy, happened to find their way into the record. If, however, upon proper pleadings, one of the defendants is shown to have certain rights, as against the others, affecting specific property, and entitling him to relief with respect to such property in the present action, a purchaser, after such pleadings have been filed, and notice of the defendant's claim for relief registered, is bound as a purchaser *pendente lite*.[2]

§ 201. **Affects only Pendente Lite Intermeddlers.** — The *lis pendens* "is only constructive notice of the pendency of the suit as against persons who have acquired some title to or interest in the property involved in the litigation" under the parties to the suit, "or some of them, *pendente lite*."[3] It can, in no circumstances, operate upon parties whose rights were acquired anterior to the commencement of the suit.[4] Persons purchasing or otherwise acquiring interests in the property prior to the commencement of the suit are not regarded as having any notice of it, or as taking a right or title which can be prejudiced by the judgment therein.[5]

A very serious question is, whether this rule is applicable to persons who have acquired a title or lien by virtue

[1] Bellamy *v.* Sabine, 1 De Gex & J. 566.

[2] Tyler *v.* Thomas, 25 Beav. 47.

[3] Stuyvesant *v.* Hall, 2 Barb. Ch. 151.

[4] Hunt *v.* Haven, 12 Am. Law Reg. 592; 52 N. H. 162; Haughwout *v.* Murphy, 22 N. J. Eq. 545; Ensworth *v.* Lambert, 4 Johns. Ch. 605; People *v.* Connelly, 8 Abb. Pr. 128; Chapman *v.* West, 17 N. Y. 125; Houston *v.* Timmerman, 17 Or. 499; 11 Am. St. Rep. 848; Banks *v.* Thompson, 75 Ala. 531; Coles *v.* Allen, 64 Ala. 93; Newcomb *v.* Nelson, 54 Iowa, 324.

[5] Arnold *v.* Smith, 80 Ind. 417; Rodgers *v.* Dibiell, 6 Lea, 69; Bradley *v.* Luce, 99 Ill. 234; Hopkins *v.* McLaren, 4 Cow. 677; Curtis *v.* Hitchcock, 10 Paige, 399.

of a conveyance or mortgage which has not been filed for record, and of which the person invoking the aid of the law of *lis pendens* had no notice, actual nor constructive. The question is sometimes controlled by statutes, as where suits for partition, to foreclose liens, and the like, are commenced and conducted under enactments declaring that persons whose interests do not appear of record need not be made parties, or that when a notice of the pendency of an action is filed the judgment shall bind persons whose conveyances are not then recorded.[1] Generally, the statutes authorizing the registration of writings affecting the title to real property do not make them void while unregistered, but merely protect from their operation innocent purchasers or encumbrancers from the parties thereto, or some of them. If a suit results in the sale of property so that some one becomes an innocent purchaser thereunder, he is doubtless protected from unrecorded writings of which he has no actual or constructive notice;[2] but unless and until some one becomes such a purchaser, one whose title or lien antedates the suit, but is not of record, is not bound by the *lis pendens*. Hence if a suit is brought by A against B to quiet title to property, or to recover possession thereof, after B has conveyed to C, the latter cannot be bound by the judgment, when he is not a party to the action, because neither A nor any of his grantees can be regarded as purchasers or encumbrancers under either B or C, who are the parties to the unrecorded conveyance.[3]

If the owner of land has entered into a contract for its sale, whereby the purchaser has become vested with an equity entitling him to a conveyance, he is not regarded

[1] Collingwood *v.* Brown, 106 N. C. 362; Lamont *v.* Cheshire, 65 N. Y. 30.

[2] *Post*, sec. 366; Freeman on Executions, sec. 336; Sprague *v.* White, 73 Iowa, 670.

[3] Smith *v.* Williams, 44 Mich. 240; Hammond *v.* Paxton, 58 Mich. 393; Vose *v.* Morton, 4 Cush. 27; 50 Am. Dec. 750; Hall *v.* Nelson, 23 Barb. 88. *Contra*, Norton *v.* Birge, 35 Conn. 250; Smith *v.* Hodson, 78 Me. 180; but this case was decided under a statute declaring an unrecorded deed to be void, except as against the grantor and his heirs and devisees.

as a purchaser *pendente lite* as to any suits subsequently commenced, and a conveyance made to him, though during the pendency of such a suit, is not subject to the judgment therein.[1] One in possession prior to a suit cannot be divested of such possession under a judgment against his grantor. This rule applies where the possession is held under an executory contract as well as under a completed purchase and payment.[2] Parties having an interest in lands by contract of purchase with the legal holders of military land-warrants, having paid the purchase-money, and being in possession, are necessary parties to a suit, instituted by the legal holders of the same, to compel an assignment of such warrants and all interest acquired under them by entry, location, and survey. If not made parties, they are not prevented by the doctrine of *lis pendens* from proceeding, during the pendency of such suit, to clothe their junior equity with the legal title by procuring patents from the United States.[3] In a case decided in New York in 1833, the defendants had made contracts to purchase, under which they had entered into possession of the lands, and held and improved the same for several years. Suit was then commenced against their vendor, during the pendency of which they, without any actual notice, completed their payments and procured conveyances. They were sought to be bound by the decree rendered against their grantor; but it was decided that the reasons on which the doctrine of *lis pendens* were founded were inapplicable to the case; that it was unreasonable to compel the humble tenant in possession of the land to examine the files of the courts every time he wished to pay an installment of the purchase-money, while no hardship could be occasioned by requiring plaintiff to make parties to his suit all persons in the open possession of the lands to be affected thereby.[4]

[1] Franklin Sav. B. *v.* Taylor, 131 Ill. 376; Walker *v.* Goldsmith, 14 Or. 125; Rooney *v.* Michael, 84 Ala. 585.

[2] Clarkson *v.* Morgan, 6 B. Mon. 441.

[3] Gibler *v.* Trimble, 14 Ohio, 323.

[4] Parks *v.* Jackson, 11 Wend. 442; 25 Am. Dec. 656.

As the operation of the law of *lis pendens* cannot extend to persons acquiring title under either of the parties anterior to the commencement of the suit, it is, if possible, still less applicable to persons whose title does not appear to be in any way connected with the parties to the suit. Therefore whoever purchases property from one whose title is paramount to that of the parties to the suit, or which, if not paramount, is not connected with it or them, by anything contained in the proceedings in the suit or elsewhere affecting him with notice, cannot be prejudiced by their suit.[1]

§ 202. **Diligence.** — The doctrine of *lis pendens*, though upheld as a necessity, is, as against a *bona fide* purchaser without notice, considered as a hard rule, and not to be favored.[2] On the one hand, it is said that "courts gladly avail themselves of any defect in the pleadings or proofs of the plaintiff to prevent its operation upon such a purchaser";[3] while, on the other hand, it is held that the benefit of *lis pendens* can only be lost by unusual and unreasonable delay, and not by ordinary negligence.[4] There can be no doubt, however, that to affect purchasers there must be a close and continuous prosecution of the suit; the exercise of a reasonable diligence, unaccompanied with "any gross slips or irregularities by which injury could accrue to the rights of third parties."[5] What constitutes unreasonable want of diligence, or undue delay, must be decided under the particular circumstances of each case. No general rules upon the subject have come under our

[1] Allen *v.* Morris, 34 N. J. L. 159; Stuyvesant *v.* Hone, 1 Sand. Ch. 419; Shaw *v.* Barksdale, 25 S. C. 204; Travis *v.* Topeka S. Co., 42 Kan. 625; Green *v.* Rick, 121 Pa. St. 130; 6 Am. St. Rep. 760.

[2] Hayden *v.* Bucklin, 9 Paige, 511; Sorrell *v.* Carpenter, 2 P. Wms. 483.

[3] Ludlow *v.* Kidd, 3 Ohio, 541.

[4] Gossom *v.* Donaldson, 18 B. Mon. 230; 68 Am. Dec. 723.

[5] Preston *v.* Tubbin, 1 Vern. 286; Clarkson *v.* Morgan, 6 B. Mon. 441; Watson *v.* Wilson, 2 Dana, 406; 26 Am. Dec. 459; Myrick *v.* Selden, 36 Barb. 22; Edmeston *v.* Lyde, 1 Paige, 637; 19 Am. Dec. 454; Trimble *v.* Boothby, 14 Ohio, 109; 45 Am. Dec. 526; Hayes *v.* Nourse, 114 N. Y. 595; 11 Am. St. Rep. 700; Durand *v.* Lord, 115 Ill. 610; Wallace *v.* Marquett, 88 Ky. 130. And the prosecution of the suit must not be collusive: Rippetoe *v.* Dwyer, 65 Tex. 703; 22 Am. Rep. 370.

observation; and perhaps none can be framed which would be of any particular service. In Kentucky, suit was commenced to foreclose a mechanic's lien, and became ready for judgment by reason of the defendant's filing an admission of the allegations of the complaint. Three years later, no decree being entered, the defendant mortgaged the same premises to a party having no knowledge of the lien or suit. The delay was deemed sufficient to relieve the purchaser from the operation of *lis pendens*.[1]

§ 203. **New Suit, and Revivor.** — If a suit were not prosecuted with effect, — as if, at law, it were discontinued, or the plaintiff suffered nonsuit; or if, in chancery, the suit were dismissed for want of prosecution, or for any other cause not on the merits; or if, at law or in chancery, any suit abated, — although in all such cases a new action could be brought, — it could not affect a purchaser during the pendency of the first suit.[2] In case of abatement, however, the suit might be continued in chancery by *revivor*, or at law in real actions abated by death of a party, by *journies accounts*, and the purchaser still bound by the judgment or decree.[3] But in all cases there must be no *laches* in reviving the suit; for a failure to revive in a reasonable time results in a suspension of the *lis pendens*.[4] In Kentucky, "a reasonable time" is one year.[5] A reasonable excuse for the delay complained of is always available to keep up the *lis pendens*.[6]

§ 204. **Dismissal.** — During the pendency of an action in equity for a specific performance, A purchased the subject-matter in controversy. The bill was subsequently dismissed without prejudice, with leave to proceed *de novo*.

[1] Ehrman *v.* Kendrick, 1 Met. (Ky.) 146; Mann *v.* Roberts, 11 Lea, 355.

[2] Newman *v.* Chapman, 2 Rand. 98; 14 Am. Dec. 766; Watson *v.* Wilson, 2 Dana, 408; 26 Am. Dec. 459; Herrington *v.* Herrington, 27 Mo. 560.

[3] Newman *v.* Chapman, 2 Rand. 98; 14 Am. Dec. 766; Watson *v.* Wilson, 2 Dana, 408; 26 Am. Dec. 459.

[4] Trimble *v.* Boothby, 14 Ohio, 109; 45 Am. Dec. 526; Shiveley *v.* Jones, 6 B. Mon. 274; Watson *v.* Wilson, 2 Dana, 406; 26 Am. Dec. 459.

[5] Hull *v.* Deatly's Adm'r, 7 Bush, 687.

[6] Wickliffe *v.* Breckenridge, 1 Bush, 443.

To the subsequent proceeding A was made a party, but contended that his purchase was without notice of the plaintiff's rights. It was decided that the effect of the former suit as a *lis pendens* was not impaired by the dismissal of the bill with leave to proceed *de novo;* that by the immediate filing of his bill *de novo* the plaintiff had been constant and continuous in his prosecution; and that it might well be doubted whether A would not have been affected by *lis pendens*, if his purchase had taken place after the dismissal of the first bill, and before the filing of the second.[1] But in another case the doctrine that a purchaser pending a bill dismissed without prejudice is bound by the subsequent bill is expressly denied.[2]

§ 205. **Writ of Error and Bill of Review.** — According to some of the authorities, a purchaser after final decree, and before writ of error or bill of review is prosecuted, is a *pendente lite* purchaser. Hence a party purchasing land from a person who had obtained a conveyance of the land from a commissioner appointed by the court for that purpose is liable to have his title divested, if the decree should be set aside by bill of review filed after the purchase;[3] and this, although the defendants were infants, and allowed a number of years to file their bill of review.[4] But in relation to writs of error, the position has been taken that "until service of citation a writ of error is not to be considered as pending so as to affect strangers as *lis pendens*. It is contended that a writ of error is but the continuance of the original suit, and, like a bill of revivor or an appeal, reinstates the suit, and refers all things and parties to its first commencement. We do not concede that such, in all cases, would be the consequence of a bill of review or of an appeal. But in this case we

[1] Ferrier *v.* Buzick, 6 Iowa, 258; Bishop of Winchester *v.* Paine, 11 Ves. Jr. 200.

[2] Clarkson *v.* Morgan, 6 B. Mon. 441.

[3] Debell *v.* Foxworthy, 9 B. Mon. 228; Clarey *v.* Marshall, 4 Dana, 95; Earle *v.* Crouch, 3 Met. (Ky.) 450; Gore *v.* Stackpoole, 1 Dow, 31; Clark's Heirs *v.* Farrow, 10 B. Mon. 446; 52 Am. Dec. 552.

[4] Ludlow's Heirs *v.* Kidd's Ex'r, 3 Ohio, 541; Bishop of Winchester *v.* Beaver, 3 Ves. Jr. 314.

think the analogy does not hold good. In the obvious nature and character of the proceeding, a writ of error is a new and original suit. Original process issues in it, and must be served, to bring the adverse party into court. The relative character of the parties is changed, new pleadings are made up, and a final judgment upon it, though it may operate on another cause, is, nevertheless, a termination of the new suit or process in error." As the result of these views, it was determined that when lands had been awarded to A by the decree in a chancery suit, and he had been placed in possession thereof, his subsequent conveyance of the lands passed a title not liable to be divested by a writ of error, unless the proceedings upon such writ were commenced and citation served on the defendant in error prior to his conveyance.[1] Where a right of appeal is given, it seems essential to the efficient exercise of the right that purchasers should be regarded as acquiring their interests subject to the contingency of diminution or loss by the subsequent reversal of the judgment, and therefore that they must be held to be purchasers *pendente lite*, if their purchase was made at any time after the commencement of the suit and the decision on appeal.[2]

§ 206. **Termination of Lis Pendens.**—"There is no such doctrine in this court that a decree made here shall be an implied notice to a purchaser after the cause is ended, but it is the pendency of the suit that creates the notice; for as it is a transaction in a sovereign court of justice, it is supposed that all people are attentive to what passes there, and it is to prevent a greater mischief that would arise by people's purchasing a right under litigation, and then in contest; but where it is only a decree to account, and not such a one as puts a conclusion to the matters in

[1] Taylor *v.* Boyd, 3 Ohio, 337; 17 Am. Dec. 603; Ludlow *v.* Kidd, 3 Ohio, 541; McCormick *v.* McClure, 6 Blackf. 466; 39 Am. Dec. 441; Wooldridge *v.* Boyd, 13 Lea, 151.

[2] Smith *v.* Brittenham, 109 Ill. 540; Real E. S. I. *v.* Collonious, 65 Mo. 290; Carr *v.* Cates, 96 Mo. 271; Dunnington *v.* Elston, 101 Ind. 373.

question, that is still such a suit as does affect people with notice of what is doing."[1] The language here used, if true at all, must be so to a limited extent only; for if the effect of the rules of *lis pendens* terminates with the entry of judgment, then they will doubtless be evaded in all cases by transfers made thereafter. Of what advantage is it to declare that transfers made during the pendency of an action shall not prevail as against the judgment, but that transfers made immediately afterwards shall not be affected by it? If a judgment is rendered for the sale or possession of property, or for any other relief involving its title, certainly it is not true that a subsequent purchaser is free to disregard it, or at liberty to hold possession of the property and relitigate the issues determined by the judgment.[2] It may be that after judgment the *lis pendens* does not operate as constructive notice for purposes disconnected with the suit,[3] or that where a judgment is by statute given the effect of a conveyance that it must, like other conveyances, be recorded, to charge subsequent purchasers with notice of it as a conveyance. By virtue of a statute of Indiana, when a decree for the conveyance of land is not complied with, it shall, notwithstanding, be deemed and taken to have the same force in all courts of law and equity, as if the conveyance had been made. Pending a suit for specific performance, the defendant conveyed the property in controversy to W. Afterwards, a decree was entered and a conveyance was made. This conveyance was recorded among the records of the court, but not among the records of the county. Subsequently W. conveyed to J. It was decided that J. obtained the title, because the decree was not notice, and the records of the county did not disclose any defect in W.'s title; that the case could not be distinguished from that of judgment and sale at law, where a purchaser under execution

[1] Worsley *v.* Earl of Scarborough, 3 Atk. 392; Harvey *v.* Montague, 1 Vern. 122; Sugden on Vendors, 1047; Ludlow *v.* Kidd, 3 Ohio, 541.

[2] McCauley *v.* Rogers, 104 Ill. 578; Biddle *v.* Tomlinson, 115 Pa. St. 299.

[3] Coe *v.* Manseau, 62 Wis. 81.

who does not put his deed on record stands, in respect to the registration laws, as if he had purchased from the defendant.[1] But a purchaser from a mortgagor, after a decree of foreclosure, is liable to be removed from possession under a writ of assistance. "It cannot be objected that the case is no longer *lis pendens* after decree and sale, and a conveyance executed, because the court of chancery is *not functus officio* until the decree is executed by delivery of possession."[2]

§ 207. **Where Realty is in Possession of the Court.** — In case real estate is taken into possession by a court, through the appointment of a receiver, or by sequestration, it is not to be intermeddled with, without leave of the court. Any person having a paramount claim, by judgment or mortgage, should appear in court and obtain leave to proceed. The court will direct a master to inquire into the circumstances or as to the priority of the lien, and will take care that the fund realized from the land is applied accordingly. A party having a prior legal encumbrance, and having no notice of the proceeding in equity, may, no doubt, still hold such encumbrance after the land is sold at equity, and might, after the land had been removed from the possession of the court of chancery, pursue his legal remedy; but if, while the land is in custody of equity, he takes out execution and sells, the purchaser will take no title as against the chancery sale.[3]

§ 208. **Involuntary Transfers.** — A distinction no doubt exists as to the effect of voluntary transfers *pendente lite*, and those compulsory transfers made by operation of law, in which, as in involuntary proceedings in bankruptcy, the property of a party is transferred to an assignee for the benefit of creditors. Such assignee is not bound to know what suits are pending to affect the property of the

[1] Rosser *v.* Bingham, 17 Ind. 542.
[2] Jackson *v.* Warren, 32 Ill. 331.
[3] Wiswall *v.* Sampson, 14 How. 52.

assignor; and it has been held that he will not, in any event, be bound by any proceeding pending against his assignor at the time of the transfer, unless he is made a party thereto.[1] But where the proceeding is voluntary, it is instituted rather for the benefit of the applicant, than for the protection of his creditors. A transfer in such a case forms no exception to the rule of ordinary transfers *pendente lite*. The assignee is bound by the judgment, whether he is made a party or not.[2] But a purchaser at an execution sale is considered as a voluntary purchaser. He acquires no title superior to that possessed by the judgment defendant at the moment of the creation of the judgment lien. If when such lien attached the title for the defendant had already been tied up by the pendency of some other suit, the purchaser at the execution sale can acquire nothing which is not also subject to the hazard of such other suit. Such purchaser is bound by the result of pending litigation, and there is therefore no necessity of making him a party thereto.[3]

§ 209. **Vendee of Vendee.** — An early case in Virginia is understood as restricting the doctrine of *lis pendens* to purchases and conveyances from the parties to the suit, and as having no force against a person who obtains a transfer *pendente lite* from some person who, though not himself a party to the suit, obtained his title *pendente lite* from one who was such a party.[4] This case, so far as our observation extends, has never been affirmed; but the cases necessarily in direct conflict with it do not seem to be numerous.[5] The general expression that *lis pendens* only affects purchasers from parties to the suit *pendente lite* is of frequent occurrence in the reports. Upon examination of the cases in which such expressions are employed, they will generally, if not invariably, be found

[1] Sedgwick *v.* Cleveland, 7 Paige, 290.
[2] Cleveland *v.* Boerum, 24 N. Y. 613.
[3] Steele *v.* Taylor, 1 Minn. 278; Hart *v.* Marshall, 4 Minn. 296.
[4] French *v.* Loyal Co., 5 Leigh, 627.
[5] Norton *v.* Birge, 35 Conn. 250.

to be intended as statements of the rule applicable to transfers made prior to the institution of any suit, or to transfers *pendente lite* of titles existing independent of that in litigation. It would be very strange that if, after the general application of the doctrine of *lis pendens* had been upheld for ages as absolutely indispensable to the administration of justice, a limitation should be imposed necessarily subversive of the whole doctrine. If two or more *pendente lite* transfers are to be allowed to thwart the purposes of a suit, then the principles of necessity and of public policy, of which so much has been said, are to be regarded as decidedly more important than the interests of a *pendente lite* purchaser, but decidedly less important than the interests of his vendee. If the final judgment in any action in reference to specific property may be nullified by two transfers, instead of by one, the difficulty of the extra transfer is not likely to furnish any considerable protection to the judgment.

§ 210. **Confined to the State.** — When slaves which were subject to a suit in Tennessee were taken into Kentucky and sold, the courts of the latter state held the purchasers bound by the judgment in Tennessee.[1] Notwithstanding the opportunity to evade the force of a judgment by removing the subject-matter of litigation to another state and there disposing of it to innocent purchasers, resulting from deciding that the operation of *lis pendens* is limited by state lines, yet we apprehend that this limitation must be regarded as established, and that purchasers of property situate in one state cannot be bound by judicial proceedings against it in another, of which they had no notice.[2]

§ 211. **Lien of Attorneys.** — Where by law the attorneys in a cause have a lien upon property involved in

[1] Fletcher *v.* Ferrel, 9 Dana, 372; 35 Am. Dec. 143.

[2] Shelton *v.* Johnson, 4 Sneed, 683; 70 Am. Dec. 265; Carr *v.* Lewis Coal Co., 96 Mo. 149; 9 Am. St. Rep. 328.

litigation for their fees, the *lis pendens* is a general notice of such lien, and the client cannot, by a *pendente lite* transfer, defeat the claim.[1]

§ 212. **Statute Requirements.** — The hardship to *bona fide* purchasers of real estate without notice arising from the law of *lis pendens* has been greatly ameliorated in England, and in many, if not in all, of the United States by statutes requiring the filing of notices of the pendency of actions affecting real property. Thus in England, by statute 2 Victoria, chapter 1157, it was enacted that no *lis pendens* shall bind a purchaser or mortgagee without express notice, until a memorandum or minute thereof, containing the name and the usual or last known place of abode, and the title, trade, or profession of the person whose estate is intended to be affected thereby, and the court of equity, and the title of the cause or information, and the day when the bill or information was filed, shall be left with the senior master of the court of common pleas, who shall forthwith enter the same particulars in a book, in alphabetical order, by the name of the person whose estate is to be affected. In the United States, the notice is not generally required to state all of the particulars specified in the English statutes, our law-makers being satisfied with a notice showing the nature of the suit, the parties thereto, the court where pending, and the property to be affected thereby, and the filing of such notice in an office in the county where the real estate is situate and where the records affecting it are kept, and the indexing of the notice, alphabetically, according to the names of the parties to the suit. If no notice is filed, *pendente lite* purchasers are wholly unaffected by the judgment,[2] unless they have actual knowledge of the suit, in which event they are not protected by the statute.[3]

[1] Hunt *v.* McClanahan, 1 Heisk. 503; McCain *v.* Portis, 42 Ark. 402.

[2] Benton *v.* Shafer, 47 Ohio St. 117; Decamp *v.* Carnahan, 26 W. Va. 839; Easley *v.* Barksdale, 75 Va. 274; Richardson *v.* White, 18 Cal. 102; Ault *v.* Gassaway, 18 Cal. 205; Abadie *v.* Lobero, 36 Cal. 390; Leitch *v.* Wells, 48 Barb. 637.

[3] Sampson *v.* Ohleyer, 22 Cal. 200; Abadie *v.* Lobero, 36 Cal. 390; Baker

The statutes requiring the filing of a notice of the pendency of the action, to charge subsequent purchasers or encumbrancers therewith, are generally and perhaps universally confined in the operation to real estate, and doubtless leave the law with respect to personal property as though such statutes had not been enacted. The rules respecting the interpretation and recording of notices of the pendency of suits are similar to those relating to other instruments affecting the title to real property. Each notice will be considered as a whole, and inaccuracies or mistakes in one part are immaterial, if from the writing, as a whole, no doubt remains of its signification.[1] Where a litigant has done all the statute requires him to do, he does not lose the benefit of his notice by the failure of the proper officer to index it, or to properly enter it in the records.[2] State statutes requiring the filing of notices of the pendency of actions are not retroactive, nor do they apply to proceedings in the national courts.[3]

§ 213. **In Ejectment.** — Section 27 of the Practice Act formerly in force in California required the filing of notice of the pendency of actions affecting the *title* to real estate. This section, it was held, did not apply to actions of ejectment, nor to any actions affecting the *possession only*. In such actions the title is not affected, but remains after judgment as it was before. Therefore the *pendente lite* vendee of either of the parties was held to be bound by the judgment rendered against his grantor, though no notice of the pendency of the action was filed.[4] In New York, where a judgment in ejectment has no further or higher effect than in California, a different, and it seems to us more rational, conclusion was reached. The supreme court in that state, in disposing of the question, said: "The effect given by this statute to the judg-

*v.* Pierson, 5 Mich. 456; Wisconsin C. R. R. Co. *v.* Wisconsin River L. Co., 71 Wis. 94; Wise *v.* Griffith, 78 Cal. 152; Whiteside *v.* Haselton, 110 U. S. 296.

[1] Watson *v.* Wilcox, 39 Wis. 643; 20 Am. Rep. 63.

[2] Heim *v.* Ellis, 49 Mich. 241; Haverley *v.* Alcott, 57 Iowa, 171.

[3] Wilson *v.* Hefflin, 81 Ind. 35.

[4] Long *v.* Neville, 29 Cal. 131. The statute has since been changed, and *lis pendens* may now be filed in ejectment suits.

ment recovered in an action of ejectment clearly rendered that action one which affected the title of the property in controversy in it; for it bound that title, not only as to the parties to the action, but also as to all who derived title under them from the time of the commencement of the action. To that extent the judgment, while it remained in force, conclusively settled the rights of the parties, and those claiming under them, to the property in controversy. No judgment concerning the rights of parties to real property could have any greater effect than that upon the title of those affected by it. The action was one, for that reason, in which a notice of its pendency should have been filed, in order to secure this statutory result against subsequent purchasers and encumbrancers not otherwise having notice of the pendency of the suit or the recovery of the judgment."[1] But this decision was reversed by the court of appeals, on the ground that it is difficult to see how in an action of ejectment a notice of *lis pendens* can be necessary to bind even purchasers *pendente lite* by the judgment.[2] Proceedings to condemn land are of the class requiring notice of *lis pendens* to be filed, to affect *pendente lite* purchasers without notice.[3]

§ 214. **Filing Lis Pendens before Complaint.** — Unless the statute, in effect, requires notice of the pendency of an action to be filed after it is begun, it will probably be effective though filed several days before the suit was commenced. The object is to give notice, and a *lis pendens* so filed gives as much notice as one filed simultaneously with the complaint.[4]

[1] Sheridan *v.* Andrews, 3 Lans. 129.

[2] Sheridan *v.* Andrews, 49 N. Y. 482.

[3] Bensley *v.* Mountain Lake Water Co., 13 Cal. 306; 73 Am. Dec. 575.

[4] Houghton *v.* Mariner, 7 Wis. 244; but in New Jersey a *lis pendens* filed before the bill has been characterized as a fraud and a nullity: Walker *v.* Hill's Executors, 22 N. J. Eq. 525; and in Weeks *v.* Tomes, 16 Hun, 349, it was held that an order to file a complaint *nunc pro tunc* as of the day on which the notice of action was filed, could not operate to cut off the rights of a purchaser acquired subsequent to filing the notice, but before the actual filing of the complaint. The statute in force in Wisconsin now requires notices of actions to be filed at the time of filing the complaint, or afterwards; but if the suit is to foreclose a mortgage the notice must be filed twenty days before judgment: See Sanborn and Berryman's Wis. Stats., sec. 3187; Olson *v.* Paul, 56 Wis. 30.

# CHAPTER XI.

## MERGER, OR FORMER RECOVERY.

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§ 215. **General Principles.** — The entry of a judgment or decree establishes in the most conclusive manner and reduces to the most authentic form that which had hitherto been unsettled, and which had, in all probability, depended for its settlement upon destructible and

uncertain evidence. The cause of action thus established and permanently attested is said to merge into the judgment establishing it, upon the same principle that a simple contract merges into a specialty. Courts, in order to give a proper and just effect to a judgment, sometimes look behind, to see upon what it was founded, just as they would, in construing a statute, seek to ascertain the occasion and purpose of its enactment. The cause of action, though it may be examined to aid in interpreting the judgment, can never again become the basis of a suit between the same parties. It has lost its vitality; it has expended its force and effect. All its power to sustain rights and enforce liabilities has terminated in the judgment or decree.[1] It "is drowned in the judgment,"[2] and must henceforth be regarded as *functus officio*.

The well-established principle of law that no further action can be prosecuted between the same parties upon a matter already ripened into judgment is supported by a variety of reasons. Its operation is in many respects beneficial. Its existence has been variously accounted for, according to the purposes subserved and the reasons involved in the vast number of cases in which it has been recognized. The early decisions place the rule upon the sole ground that an inferior remedy has been changed to one superior. Thus it was said if a man brought debt upon a bond and had judgment in a court of record, the contract by specialty, being of a more base nature, was changed into a thing of record, and no further suit could be brought to vex the defendant; but if plaintiff had his judgment in a court not of record, he might bring an-

[1] Wayman *v.* Cochrane, 35 Ill. 152; Hogg *v.* Charlton, 25 Pa. St. 200; Baker *v.* Baker, 28 N. J. L. 13; 75 Am. Dec. 243; Barnes *v.* Gibbs, 31 N. J. L. 317; 86 Am. Dec. 210; Pike *v.* McDonald, 32 Me. 418; 54 Am. Dec. 597; Bank of N. A. *v.* Wheeler, 28 Conn. 433; 73 Am. Dec. 683; North *v.* Mudge, 13 Iowa, 496; 81 Am. Dec. 441; Cooksey *v.* Kansas City etc. R. R. Co., 74 Mo. 477; Grant *v.* Burgwyn, 88 N. C. 95; Mobile Bank *v.* Mobile etc. R. R. Co., 69 Ala. 305; Thomason *v.* Odum, 31 Ala. 168; 68 Am. Dec. 159. Merger also results from a decree for the payment of moneys due on a bond: Mutual F. I. Co. *v.* Newton, 50 N. J. L. 571.

[2] Biddleson *v.* Whitel, 1 W. Black. 507.

other action, because his bond had not been changed into a matter of higher nature.[1] In later cases, in addition to the mere assertion that the judgment is of a higher nature than the cause of action, the allowance of a new suit is shown to be a superfluous and vexatious encouragement to litigation, injurious to the defendant, and of no benefit to the plaintiff.[2] The doctrine of merger is also frequently supported on the ground that the cause of action has become a thing adjudicated and precisely determined and ascertained, and therefore, upon principles of public policy, not to be again made the subject of judicial inquiry. But, in our judgment, the bar occasioned by a former recovery has been gradually strengthened and extended, until it has become independent of the reasons generally assigned in its support. We doubt whether, in a majority of the United States, two suits could be prosecuted to judgment on the same cause of action, against the objection of the defendant, irrespective of the question whether the first judgment was of a higher or lower nature than the cause of action. If, for instance, an action were brought in a justice's court upon a judgment of the district court for a sum less than three hundred dollars, and prosecuted with effect, the judgment recovered would be of a lower nature than the one sued upon; it would be no more a thing adjudicated than the cause of action was, and yet the plaintiff would probably not be at liberty to bring similar actions *ad libitum*. The new judgment, though inferior as an instrument of evidence to the old one, and not attended by the same liberal jurisdictional presumptions, ought, nevertheless, to entirely supplant the old one, because it is the most recent judicial determination of the rights of the parties, and because the plaintiff has voluntarily elected to abandon his former judgment to secure one which, though in an inferior court, is conclusive in favor of the continuance and amount of his claim.

[1] Vin. Abr.; citing 6 Rep. 44 b, 45 a, b.

[2] Smith *v.* Nicolls, 5 Bing. N. C. 208; 7 Dowl. 282.

§ 216. **Includes All Causes of Action.** — The weight of authority in the United States shows that whatever may be a cause of action will, if recovered upon, merge into the judgment or decree.[1] A contract by specialty merges into a judgment, in the same manner as a simple contract.[2] A judgment is extinguished when, being used as a cause of action, it grows into another judgment.[3] It may even be merged by a statutory judgment. Thus if the law provides for the execution of a forthcoming or delivery bond, which, when forfeited, shall have the force and effect of a judgment on which execution may be issued, a forfeiture of such bond discharges the judgment upon which it was given.[4] On the other hand, some American cases, proceeding upon the theory that no merger can take place until some higher remedy or evidence is created, deny that one judgment can merge into another of equal degree.[5] On this ground a motion to enter satisfaction of a judgment because it had been recovered upon in another action was denied.[6] The effect of this ruling would be, that the estate of the debtor could be involved by a multiplicity of record liens, and his chattels seized under a great number of executions, and himself financially ruined by the expenses of divers proceedings, all based upon a single and indivisible demand.

[1] Davies *v.* New York, 93 N. Y. 259.

[2] Pitts *v.* Fugate, 41 Mo. 405; King *v.* Hoare, 13 Mees. & W. 494; Andrews *v.* Varrell, 46 N. H. 17; Grant *v.* Burgwyn, 88 N. C. 95; Murray *v.* Weigle, 118 Pa St. 159.

[3] Chitty *v.* Glenn, 3 B. Mon. 425; Whiting *v.* Beebe, 12 Ark. 549; Gould *v.* Hayden, 63 Ind. 443; Frazier *v.* McQueen, 20 Ark. 68; Gould *v.* Hayden, 63 Ind. 443.

[4] Brown *v.* Clark, 4 How. 4; Bank of U. S. *v.* Patton, 5 How. (Miss.) 200; 35 Am. Dec. 428; Wright *v.* Yell, 13 Ark. 5 3; 58 Am. Dec. 336; Hanna *v.* Guy, 3 Bush, 91; Cook *v.* Armstrong, 25 Miss. 63; Neale *v.* Jeter, 20 Ark. 98; Black *v.* Nettle, 25 Ark. 606; Russel *v.* Shute, 25 Ark. 469; Lipscomb *v.* Grace, 26 Ark. 231; 7 Am. Rep. 607. But a different rule prevails in Alabama: See Patton *v.* Hamner, 33 Ala. 307. In Kentucky, a person having pleaded guilty to an indictment charging him with being a common gambler, was adjudged "to make his fine to the commonwealth by the payment of fifty dollars." For this fine a *capias pro fine* was awarded against him, which he replevied, with one W. as his surety. At the maturity of the replevin bond, execution issued thereon, and was returned unsatisfied. After this, a second *capias pro fine* was issued, but it was, on motion, quashed, on the ground that the original judgment levying the fine had *been merged* in the replevin bond: Commonwealth *v.* Merrigan, 8 Bush, 132.

[5] Weeks *v.* Pearson, 5 N. H. 324.

[6] Mumford *v.* Stocker, 1 Cow. 178; Griswold *v.* Hill, 2 Paine, 492; Andrews *v.* Smith, 9 Wend. 53.

A person often has the privilege of pursuing either of several forms of action to obtain legal redress for a single wrong. Whenever he resorts to any action in which it is competent for the court to award him full compensation for the wrong of which he complains, and prosecutes such action to final judgment, the wrong merges in the judgment, and thereafter there can be no further recovery therefor, neither in the same nor in a different form of action.[1] Therefore a recovery in *assumpsit* on a policy of insurance bars a subsequent action of covenant on the same policy,[2] and a recovery in an action of covenant bars an action of case founded on tort, the two causes of action being the same;[3] but a judgment in replevin for the possession of chattels does not, while it remains unsatisfied, preclude a recovery in trover for their conversion, because the objects of the two actions are essentially different.[4]

§ 217. **Judgment is a New Debt.** — Every judgment is, for most purposes, to be regarded as a new debt; the chief, and perhaps the only, exception being in cases where the technical operation of the doctrine of merger would produce manifest hardship, and even those cases are by no means universally excepted. This new debt is not, in general, affected by the character of the old one. Though the cause of action may have arisen from a tort, the judgment is not therefore any the less a contract or in the nature of a contract. The tort merges in the judgment.[5] Hence it may be the foundation of an action of debt,[6] or of a set-off, under a statute permitting matters *ex contractu* to be set off.[7] Neither is it infected by the usurious nature of the cause of action.[8] The assignee of a note sued the

[1] Brown *v.* Moran, 42 Me. 44; Ware *v.* Percival, 61 Me. 391; 14 Am. Rep. 565; Cutler *v.* Cox, 2 Blackf. 178; 18 Am. Dec. 152.

[2] Marine Insurance Co. *v.* Young, 1 Cranch, 340.

[3] Cutler *v.* Cox, 2 Blackf. 178; 18 Am. Dec. 152.

[4] Nickerson *v.* Cal. Stage Co., 10 Cal. 520.

[5] Carr *v.* Beecher, 119 N. Y. 117. But the merger does not take place until the judgment is rendered. Hence a tort does not become a debt when verdict is returned thereon: Stauffer *v.* Remick, 37 Kan. 454.

[6] Johnson *v.* Butler, 2 Iowa, 535.

[7] Taylor *v.* Root, 4 Keyes, 335.

[8] Thatcher *v.* Gammon, 12 Mass. 268.

maker, who had an offset to the note, consisting of a judgment against the assignor. This set-off the maker did not present when sued upon the note, and judgment was therefore rendered against him without taking the set-off into account. Suit was subsequently brought in another state upon this last judgment; and in this last action the defendant sought the benefit of the set-off, which he had before neglected to assert. The court refused to entertain the set-off, because "the note and all the equities existing between the parties were merged in the judgment."[1] A judgment rendered in one state, upon a forfeited recognizance taken for alleged violation of its penal laws, can be made the basis of an action in another state, though objected to on the ground that one state will not aid in enforcing the penal laws of another.[2] The same rule is applicable to actions upon judgments given for violations of local police regulations, or for any other local causes of action.[3] In all such cases, no inquiry will be made in relation to the facts preceding the judgment, to ascertain whether the original action would have been enforced by the court now called upon to enforce the judgment. A debt due to the estate of a deceased person, if sued upon and recovered by an administrator, is, in law, the debt of him who recovers it, and in whose name the judgment is rendered. He holds the legal title, subject only to his trust as administrator. He may sue upon the judgment in his own name, without describing himself as administrator, and may therefore pursue the judgment defendant, by action on the judgment, in a different state from that in which the letters of administration were issued;[4] and there can scarcely be a doubt that

[1] Ault *v.* Zehering, 38 Ind. 433.

[2] Spencer *v.* Brockway, 1 Ohio, 259; 13 Am. Dec. 615.

[3] State of Ind. *v.* Helmer, 21 Iowa, 370; Healy *v.* Root, 11 Pick. 390. A judgment by consent has been said to have the same effect as any other, because "the consent was merged in the judgment": Holmes *v.* Guion, 44 Mo. 168.

[4] Bonafous *v.* Walker, 2 Term Rep. 126; Biddle *v.* Wilkins, 1 Pet. 686; Tallmadge *v.* Chappel, 16 Mass. 71; Hall *v.* Harrison, 21 Mo. 227; 64 Am. Dec. 225; Allen *v.* Lyman, 27 Vt. 20; Nelson *v.* Bagby, 25 Tex. Supp. 305.

a judgment rendered in favor of an administrator so merges the debt that it may be treated as his personal effects so far as to authorize him to maintain suit thereon in a foreign country, without there taking out letters of administration.[1]

§ 218. **Depends on Valid Judgment.** — Merger depends for its existence and continuance upon a valid judgment. Therefore, if such a mistake is made in the name of the parties as to render the judgment ineffective, the cause of action does not merge, and a subsequent suit may be brought thereon.[2] If, in support of a plea of judgment recovered, the defendant introduces the proceedings or record of a court, from which it appears that the plaintiff has taken a judgment which is *coram non judice*, such judgment will be as unavailing as a defense for the defendant as it would be as a cause of action for the plaintiff.[3] In all such cases it is obvious that the judgment produced is in fact no final determination of the rights of the parties, and that no obstacle has intervened to prevent them from seeking such determination. Though the judgment was valid at its entry, it may be reversed or set aside. In such cases the merger ceases.[4] If plaintiff recovers judgment against one of several joint obligors, and it is reversed, he may proceed against all of them in a new action.[5] The mere taking or granting of an appeal does not so impair the judgment as to destroy its effect as a merger of the original cause of action.[6] If, after the entry of judgment in his favor, a plaintiff is permitted to discontinue his action, this nullifies the judgment, and

[1] Vanquelin *v.* Bouard, 15 Com. B., N. S., 341; 33 L. J. Com. P., N. S., 78; 12 Week. Rep. 128.

[2] Wixom *v.* Stephens, 17 Mich. 518; 97 Am. Dec. 208.

[3] Briscoe *v.* Stephens, 9 Moore, 413; Mico *v.* Morris, 3 Lev. 234; Adney *v.* Vernon, 3 Lev. 243; Yon *v.* Baldwin, 76 Ga. 769; Green *v.* Clawson, 5 Del. 159; Reading *v.* Rice, 3 J. J. Marsh, 61; 19 Am. Dec. 162.

[4] Goodrich *v.* Bodurtha, 6 Gray, 323; Fries *v.* Pennsylvania R. R. Co., 98 Pa. St. 142; Fleming *v.* Reddick, 5 Gratt. 272; 50 Am. Dec. 119.

[5] Maghee *v.* Collins, 27 Ind. 83.

[6] Cloud *v.* Wiley, 29 Ark. 80.

destroys its effect as a merger.[1] So where a judgment is valid for some purposes only, as when, being based upon constructive service of process against a non-resident, its enforcement is limited to specific property, and it creates no personal liability against the defendant, it constitutes no impediment to an action to obtain a judgment enforceable against him personally.

§ 219. **Judgment of No Extraterritorial Effect.** — A judgment, valid in the jurisdiction where it was rendered, may have no extraterritorial effect, as where as to some of the defendants it was based upon service of process made out of the state, or upon process served upon a co-defendant. If so, it does not operate as a merger in favor of any defendant not personally bound by it.[2] In the case of *Swift* v. *Stark*, 2 Or. 97, 88 Am. Dec. 463, the court thought that a judgment rendered under a statute of one of the states providing for the entry of judgment against two or more joint debtors upon service of summons on but one merged the cause of action against the one not served, though as to him it was admitted to constitute only a *prima facie* evidence of indebtedness. But this portion of the opinion of the court was not necessary to the determination of the case. It does not seem to be the result of any careful examination of principles or adjudged cases, and is unquestionably incorrect.[3] In Michigan, such a judgment creates no personal liability against the unsummoned defendant. Neither is it a merger of the cause of action. The conclusion of the court was sustained by the propositions, — 1. That neither the analogies of the common law nor the reasons on which the rule is based apply to proceedings under such a statute; 2. That

[1] Loeb *v.* Willis, 100 N. Y. 231; Smith *v.* Curtiss, 38 Mich. 393; *post*, sec. 219.

[2] Middlesex Bank *v.* Butman, 29 Me. 19; McVicker *v.* Beedy, 31 Me. 314; 1 Am. Rep. 666; Rangely *v.* Webster, 11 N. H. 299; Campbell *v.* Steele, 11 Pa. St. 396; Bennett *v.* Cadwell, 70 Pa. St. 253; National Bank *v.* Peabody, 55 Vt. 492; 45 Am. Rep. 632; Stoue *v.* Wainwright, 147 Mass. 201.

[3] D'Arcy *v.* Ketchum, 11 How. 165; Wood *v.* Watkinson, 17 Conn. 500; 44 Am. Dec. 562.

by commencing an action against all the obligors the plaintiff evinced an intention to pursue them jointly; 3. That the judgment, though joint in form, was effectual against but one; 4. That by the statute the unsummoned defendants could be brought in and made personally liable after the judgment, while at common law their liability would have been extinguished.[1]

§ 220. **Foreign Judgments.** — A foreign judgment is received with different degrees of regard in different states and among different nations. Wherever it is enforced as a final adjudication between the parties, it ought also to be a bar to another suit. In Louisiana, a statute giving to foreign judgments the same force with those of the sister states was decided to inhibit any further proceedings in the original cause of action.[2] In England, a foreign judgment is, in most respects, carried into effect to the same extent which, under the provisions of our constitution and the laws of Congress, a judgment rendered in one of these United States would be enforced in another. But it is, nevertheless, not regarded as a matter of record, nor as being of a higher nature than the original cause of action. Hence it does not debar plaintiff of the remedy which every subject has of bringing his action, and he has his option either to resort to his original ground of action or to bring *assumpsit* on the judgment.[3]

§ 221. **In Sister States.** — A judgment in any of the state or federal courts, upon valid personal service, being regarded as a debt of record, and as entitled to full faith and credit, is a merger in every part of the United States,

[1] Bonesteel *v.* Todd, 9 Mich. 371; 80 Am. Dec. 90.

[2] Jones *v.* Jamison, 15 La. Ann. 35.

[3] Bank of Australasia *v.* Harding, 9 Com. B. 661; Robertson *v.* Struth, 5 Q. B. 941; Smith *v.* Nicholls, 5 Bing. N. C. 208; 7 Dowl. 282; Hall *v.* Odber, 11 East, 118; Phillips *v.* Hunter, 2 H. Black. 402; Lyman *v.* Brown, 2 Curt. 559; Bonesteel *v.* Todd, 9 Mich. 375; 80 Am. Dec. 90; Bank of Australasia *v.* Nias, 16 Q. B. 717; Eastern T. B. *v.* Beebe, 53 Vt. 177; 38 Am. Rep. 665; Frazier *v.* Moore, 11 Tex. 755; Wood *v.* Gamble, 11 Cush. 8; 59 Am. Dec. 135.

in the same manner as in the state where it was rendered.[1] If actions are simultaneously pending upon the same cause of action in different states, a judgment in either will bar the further prosecution of the other.[2] This rule is inflexible, and yields to no circumstance of hardship or inconvenience. Its application is not averted by the pendency of an appeal,[3] nor by the fact that the defendant has property in the state where the action is still pending, but none in the state where judgment has been given.[4] A judgment rendered in one state and sued upon in another merges in the judgment recovered thereon in the latter state.[5]

We have already stated that a judgment having in other respects no effect beyond the state where it was rendered is also beyond that state no merger of the original cause of action.[6] But if the judgment is against one having his domicile in the state where it was rendered, it will, according to the weight of the authorities, be given the same effect elsewhere as would be accorded to it in the jurisdiction where it was created. Hence though it is based upon constructive service of process, and infected with irregularities in the proceedings by which it was procured, and is on that account voidable but not void in the state where it was entered, still, as it is binding on the parties until avoided by some appropriate proceeding, it will, in the absence of such proceeding, be regarded even in other states as a merger of the original cause of action.[7]

No judgment is to be given any greater effect elsewhere

[1] Barnes *v.* Gibbs, 31 N. J. L. 317; 86 Am. Dec. 210; Ault *v.* Zehering, 38 Ind. 429; United States *v.* Dewey, 6 Biss. 501; Napier *v.* Gidiere, 1 Speers Eq. 215; 40 Am. Dec. 613; Baxley *v.* Linah, 16 Pa. St. 241; 55 Am. Dec. 494; Bank of N. A. *v.* Wheeler, 28 Conn. 433; 73 Am. Dec. 683; Green *v.* Starr, 52 Vt. 426; West F. R. R. Co. *v.* Thornton, 12 La. Ann. 736; 68 Am. Dec. 778. *Contra*, Beall *v.* Taylor, 2 Gratt. 532; 44 Am. Dec. 398.

[2] McGilvray & Co. *v.* Avery, 30 Vt. 538; Rogers *v.* Odell, 39 N. H. 452; Whiting *v.* Burger, 78 Me. 694; North Bank *v.* Brown, 50 Me. 214; 79 Am. Dec. 609.

[3] Bank of N. A. *v.* Wheeler, 28 Conn. 433; 73 Am. Dec. 683.

[4] Child *v.* Powder Works, 45 N. H. 547.

[5] Gould *v.* Hayden, 63 Ind. 443.

[6] See sec. 219.

[7] Henderson *v.* Stamford, 105 Mass. 504; 7 Am. Rep. 551.

than it had in the jurisdiction in which it originated. The consequence of a judgment, in respect to its effect as a merger of the original demand, being dependent upon the law of the land, a modification or repeal of the law of the land will modify or avert the incident of merger. Thus if a statute, as in Missouri and Maryland, provide that a joint contract shall be construed as joint and several, the merger of such a contract by a recovery thereon must be treated as though it had arisen out of a joint and several and not out of a joint contract.[1]

§ 222. **Merger, Instances of.** — Merger by judgment may take place, — 1. When the plaintiff has recovered upon an entire cause of action against all the parties liable thereon; 2. When he has recovered upon a cause of action to its full amount, but against part only of the persons so liable; and 3. When he has recovered upon part only of a cause of action under which he was entitled to recover a larger amount. In some instances the same person has given different contracts or obligations really representing the same liability, and the discharge of one of which operates as a satisfaction of the other. In such cases, the right exists to prosecute both contracts or obligations to judgment, and the mere recovery upon one does not merge the other.[2] Thus if the maker of a promissory note agrees with the holder to procure an indorser, the recovery upon this agreement, though the damages are assessed at a sum equal to the amount due on the note, will not prevent the recovery of judgment upon it for the same amount.[3] And generally, where a party is entitled to cumulative remedies, he may prosecute either to judgment without losing his right to pursue the other, provided they are not inconsistent. They are inconsistent when the state of facts necessary to support one remedy cannot co-exist with the facts necessary to sup-

[1] Suydam *v.* Barber, 18 N. Y. 468; 75 Am. Dec. 254; Thomas *v.* Mohler, 25 Md. 36.

[2] Lord *v.* Bigelow, 124 Mass. 185.

[3] Vanuxem *v.* Burr, 151 Mass. 386; 21 Am. St. Rep. 458.

port the other. Thus though a tort is committed, the person suffering therefrom is often allowed to waive the tort and sue in *assumpsit*, and may therefore recover either in tort or in *assumpsit*, but may not recover in both; for his recovery in *assumpsit* establishes a contract and conclusively negatives a wrong, while his recovery in tort conclusively establishes the wrong and negatives the contract.[1] A purchaser of property, which has been falsely warranted to him to be sound, may either sue in tort for the false representation, or in contract for a breach of the warranty, but having recovered in tort, he cannot afterwards recover in contract.[2] The law, however, does not favor a multiplicity of actions, and will generally not authorize a second recovery for the same wrong; and such recovery can be sustained only when it is clear that the plaintiff has by contract entitled himself to cumulative remedies, or they have been unquestionably given him by statute.[3] Hence when the maker of a note to a national bank in an action thereon availed himself of the state law against usury, and recovered judgment upon his answer and cross-petition, he cannot afterwards maintain an action under a statute of the United States for additional recovery upon the same facts under which his former recovery was had.[4] A judgment against a corporation for the price of goods sold precludes an action against it for fraud in obtaining credit for the same goods.[5] A recovery of damages for wrongfully and maliciously suing out an attachment bars an action on the attachment bond to recover special damages embraced therein;[6] and a recovery in an action of trespass for carrying away plaintiff's

[1] Agnew *v.* McElroy, 10 Smedes & M. 552; 48 Am. Dec. 772; Floyd *v.* Browne, 1 Rawle, 121; 18 Am. Dec. 602; Walsh *v.* Chesapeake C. Co., 59 Md. 423; Fields *v.* Bland, 81 N. Y. 239; Cutler *v.* Cox, 2 Blackf. 178; 18 Am. Dec. 152; Beall *v.* Pearre, 12 Md. 566; Rendell *v.* School District, 75 Me. 358; Ware *v.* Percival, 61 Me. 393; 14 Am. Rep. 472.

[2] Norton *v.* Doherty, 3 Gray, 372; 63 Am. Dec. 758.

[3] Hite *v.* Long, 6 Rand. 457; 18 Am. Dec. 719.

[4] Bollong *v.* Schuyler N. B., 26 Neb. 281; 18 Am. St. Rep. 781.

[5] Caylus *v.* New York etc. R. R. Co., 76 N. Y. 609.

[6] Hall *v.* Forman, 82 Ky. 505.

wife is a bar to an action on the case for enticing her away.[1] Though a statute declares that when the death of a person is caused by negligence his heirs or personal representatives may maintain an action for damages, it authorizes but one recovery. Hence a judgment in favor of his personal representatives must include all damages recoverable by his heirs.[2]

In the cases cited, the second action was for some wrong for which a full recovery had been had, the only difference between the two actions being in their form. The same rule applies when the second action, whether in the same or a different form, is for something not recovered for in the first, but which was an enforceable part of the cause of action there sued upon and might have been embraced in the former recovery had it been presented for consideration in the first action. Hence the following causes of action have been adjudged to be merged in former recoveries: For injuries to real estate, there having been a recovery for use and occupation in an action for possession;[3] for injuries done by a city to land in taking it for public use, there having been a recovery against it for the taking of such lands;[4] for injuries committed by a mortgagee to lands, there having been a suit against him to redeem the same lands, and for damages, and an accounting for rents and profits;[5] for damages for lands disposed of by a vendor, there having been a judgment against him for specific performance as to other portions of the lands which he had agreed to sell.[6] One who has a set-off or counterclaim, and who sues and recovers judgment thereon, cannot afterwards insist upon it as a payment to be applied upon a note given by him to the defendant, because its existence as a cause of action at the time of recovering upon it is inconsistent with its being

[1] Gilchrist *v.* Bale, 8 Watts, 355; 34 Am. Dec. 469.

[2] Munro *v.* Dredging Co., 84 Cal. 515; 18 Am. St. Rep. 248.

[3] Pierro *v.* St. Paul etc. R'y Co., 37 Minn. 314; 12 Am. St. Rep. 673.

[4] Lewis *v.* Boston, 130 Mass. 339.

[5] Steen *v.* Maek, 32 S. C. 286.

[6] Thompson *v.* Myrick, 24 Minn. 4.

at the same time a payment on the note.[1] Where a statute provided for the presentation and establishing of claims against estates before a court, it was held that a claim so established merged into the judgment establishing it, and would no longer draw interest as a claim;[2] nor could any further recovery be had upon it in an independent action by showing that the presentation was for part only of the amount due.[3] If in proceedings to condemn land a mortgagee is awarded the amount secured by his mortgage, the indebtedness is merged in the judgment of condemnation, and he can maintain no further proceeding to obtain his debt, except upon the award.[4] A statute in Ohio provided that a mortgagee might prosecute a *scire facias* and obtain a judgment for his debt, with execution against the mortgaged premises only. After the mortgagee proceeded under this statute, his debt was merged, so that he could have no further action upon it.[5]

§ 223. **Exceptions.**—In order, however, to create a merger, the plaintiff must have had an opportunity to recover his entire demand. A plea of judgment recovered will not be supported, unless it appears that the precise thing in controversy in the second suit could have been recovered in the first. Thus if plaintiff, proceeding in a court of admiralty, obtains a judgment of condemnation against a vessel for a collision, and has her sold, he is not precluded from proceeding to recover such further damages as he may have suffered from the collision, in excess of the value of the vessel condemned, because he could not have recovered this excess in the proceeding against the vessel.[6] It has also been decided that a judgment obtained against a steamboat is not a bar, until satisfied, to an action against the owners upon the same

[1] Aultman *v.* Gamble, 88 Ala. 424.
[2] Mitchell *v.* Mayo, 16 Ill. 83.
[3] Gibson *v.* Hale, 57 Tex. 405.
[4] Sheperd *v.* Mayor of N. Y., 13 How. Pr. 286.
[5] Reedy *v.* Burgert, 1 Ohio, 157.
[6] Nelson *v.* Crouch, 15 Com. B., N. S., 99; and a judgment against a master for supplies does not bar the maintenance of suit in admiralty to enforce a lien therefor: The Brothers Apap, 34 Fed. Rep. 352.

liability, on the ground that the remedy against the boat is cumulative.[1] The courts in Michigan refused to apply the law of merger to a case where, though no legal impediment existed to a full and adequate recovery in the first suit, such recovery was prevented by the fact that the defendant, being the agent of the plaintiff, had, until subsequent to the rendition of the first judgment against him, fraudulently concealed from plaintiff the existence of certain items of indebtedness, which, had they not been so concealed, would have been included in the former suit.[2] A judgment for a debt does not prevent the plaintiff from subsequently maintaining an action to bar the defendant's equity of redemption in the lands on which a mortgage had been given to secure the same debt;[3] and if two distinct judgments have been entered on the same cause of action, the merger of one of those judgments in a statutory judgment does not affect the other.[4] Other cases may be cited in which exceptions have been recognized, but on examination they will, we think, be found to be more correctly regarded as instances in which courts have, from considerations of hardship, refused to apply the law of merger, than as proper exceptions to it. Thus recoveries have been sustained for causes of action or parts of causes of action not included in the former actions on account of the mistake or ignorance of the plaintiff,[5] but exceptions of this kind are not sustainable. Neither the mistake of the parties nor of the court can justify the denial of the effect of a former judgment as a merger.[6] Where four separate actions were brought at the same time for four monthly installments of rent due

[1] Toby *v.* Brown, 11 Ark. 308.

[2] Johnson *v.* Provincial Ins. Co., 12 Mich. 216; 86 Am. Dec. 49. See also Ferrall *v.* Bradford, 2 Fla. 508; 50 Am. Dec. 293.

[3] Harris *v.* Vaughn, 2 Tenn. Ch. 483.

[4] National Bank of Monticello *v.* Bryant, 13 Bush, 419.

[5] Stevens *v.* Damon, 29 Vt. 521; Kane *v.* Morehouse, 46 Conn. 300.

[6] Moran *v.* Plankington, 64 Mo. 337; Ewing *v.* McNairy, 20 Ohio St. 315; Stockton *v.* Ford, 18 How. 418; Keokuk Co. *v.* Alexander, 21 Iowa, 377; Wickersham *v.* Whedon, 33 Mo. 561; Baker *v.* Baker, 28 N. J. L. 13; 75 Am. Dec. 243; Cooksey *v.* Kansas City etc. R. R. Co., 74 Mo. 477; Winslow *v.* Stokes, 3 Jones, 285; 67 Am. Dec. 242.

upon a lease, and the defendant made no objection to this severance of the causes of action until after judgment had been recovered upon one of them, it was held that he had waived his right to insist that that judgment merged the demands sued for in the other actions.[1] So when actions were brought under circumstances somewhat similar, and the court had erroneously determined that a separate action could be maintained on each installment, though others were due, the judgment was held to estop the defendant from afterwards insisting that the contract out of which the rights of action arose was such as to require the plaintiff to sue for all the installments due thereunder at the commencement of the suit.[2]

§ 224. **Pendente Lite.** — No demand included in the plaintiff's complaint, or in the defendant's set-off or counterclaim, can be allowed if at any time before its allowance, but during the pendency of the action, it has been taken into account in forming a judgment in another action between the same parties,[3] whether the action in which the judgment was entered was commenced before or after the pending suit.[4]

§ 225. **Criminal Prosecutions and Convictions.** — The doctrine of the earlier authorities was, that all civil remedies in favor of a party injured by a felony were merged in the higher offense against society and public justice, or, at least, that such remedies were suspended, and could not be pursued until after the trial and conviction of the offender.[5] This doctrine is obsolete; and the civil remedy may be pursued either before or after the prosecution

[1] Fox *v.* Althorp, 40 Ohio St. 322.

[2] Lorillard *v.* Clyde, 122 N. Y. 41; 19 Am. St. Rep. 470.

[3] Davis *v.* Bedsole, 60 Ala. 362; Andrews *v.* Varrell, 46 N. H. 17; McGilvray *v.* Avery, 30 Vt. 538; Bank of North America *v.* Wheeler, 28 Conn. 433; 73 Am. Dec. 683.

[4] Schuler *v.* Israel, 125 U. S. 506; Bank of U. S. *v.* Merchants' Bank, 7 Gill, 415; Estes *v.* Chicago, 72 Iowa, 235.

[5] Foster *v.* Tucker, 3 Greenl. 458; 14 Am. Dec. 243, and note; Boston R. R. Co. *v.* Dana, 1 Gray, 83, 97.

and conviction of the criminal.[1] The doctrine also formerly prevailed that the conviction of certain felonies was a bar to any prosecution for any other felony, whether committed subsequently or antecedently to the conviction. The result of a conviction for most felonies was, that the offender became by operation of law "in a state of attainder." It was early held that a person thus attainted might plead the same in bar to a subsequent prosecution for any other felony, for by his first attaint his possessions were forfeited, his blood corrupted, and he became dead in law; therefore any further conviction would be fruitless. This plea was styled the plea of *autrefois attaint*, or former attainder.[2] The early common-law rule has been recognized to a very limited extent in this country;[3] but is doubtless now obsolete in America,[4] and abolished by statute in England.[5]

The conviction of an offense, like the recovery of judgment in a civil action, is a bar to any further prosecution based on the same cause of complaint. The question often arises whether the offense of which one is accused is not a part of an offense of which he has been already convicted, and if so, whether the whole crime is not merged in the former conviction, for the same offense cannot be split into parts and made to sustain two or more convictions of the same person.[6] Thus one who by the same act passed four forged checks to the teller of a bank was adjudged to be guilty of but one offense, and his conviction of uttering one of the checks was held to

[1] 1 Hilliard on Torts, 59, 60; note to Foster *v.* Tucker, 3 Greenl. 458, 14 Am. Dec. 243, and the authorities there cited; Pettingill *v.* Rideout, 6 N. H. 454; 25 Am. Dec. 473.

[2] See note to Crenshaw *v.* State, 17 Am. Dec. 791, and the authorities there cited.

[3] Crenshaw *v.* State, 1 Mart. & Y. 122; 17 Am. Dec. 788.

[4] Hawkins *v.* State, 1 Port. 475; 27 Am. Dec. 641; State *v.* McCarty, 1 Bay, 334; State *v.* Comm'rs, 2 Murph. 371.

[5] Stats. 7 & 8 Geo. IV., c. 28, sec. 4. The rule was in active operation in England at a comparatively recent period: Rex *v.* Birhett, 1 Russ. & R. C. C. 288; Rex *v.* Jennings, 1 Russ. & R. C. C. 388.

[6] Rex *v.* Britton, 1 Moody & R. 297; Francisco *v.* State, 24 N. J. L. 30; Fisher *v.* Comm., 1 Bush, 211; 89 Am. Dec. 620; Moore *v.* State, 71 Ala. 307; State *v.* Cameron, 3 Heisk. 78; Holt *v.* State, 38 Ga. 187.

preclude his subsequent prosecution for uttering the others.[1] The larceny of several articles at one time, and by one act, though belonging to different persons, is but one offense. The state cannot split this offense into parts, and prosecute it by fractions. A conviction of any part may be pleaded in bar to a prosecution for any other part.[2] Hence a conviction for having forged bank bills and counterfeit plates in the defendant's possession, with the intent to pass or use them, bars a subsequent prosecution based upon other bank bills or plates in his possession at the same time.[3] When the offense charged necessarily includes a lesser crime, of which the jury may, under the indictment, find the defendant guilty, his conviction of the greater crime bars his further prosecution for the lesser.[4] On the other hand, if the defendant has committed a lesser offense, of which he cannot be convicted under the indictment against him, then his conviction of the lesser offense cannot be regarded as included in his conviction of the offense for which he is indicted, and a second prosecution for the lesser offense is sustainable.[5]

If a defendant is charged with a crime in an indictment under which he may be convicted of a lesser crime, his conviction of such lesser crime is tantamount to his acquittal of the greater, and of course bars any further prosecution therefor.[6] But suppose the conviction of the

[1] State *v.* Egglesht, 41 Iowa, 574; 20 Am. Rep. 612.

[2] State *v.* Cameron, 40 Vt. 555; Lorton *v.* State, 7 Mo. 55; 37 Am. Dec. 179; State *v.* Nelson, 29 Me. 329; People *v.* Van Kuren, 5 Park. Cr. 66; State *v.* Williams, 10 Humph. 101; State *v.* Morphine, 37 Mo. 373; Jackson *v.* State, 14 Ind. 327. *Contra*, Regina *v.* Brettel, 1 Car. & M. 609; State *v.* Thurston, 2 McMull. 382.

[3] State *v.* Benham, 7 Conn. 414; People *v.* Van Keutzen, 5 Park. Cr. 66; State *v.* Egglesht, 41 Iowa, 574; 20 Am. Rep. 612; United States *v.* Miner, 11 Blatch. 511.

[4] Sanders *v.* State, 55 Ala. 42; State *v.* Standifer, 5 Port. 523; Thomas *v.* State, 40 Tex. 30; Dunn *v.* State, 70 Ind. 47; State *v.* Pitts, 57 Mo. 85.

[5] Mumford *v.* State, 39 Miss. 558; Moore *v.* State, 59 Miss. 25; State *v.* Wightman, 26 Mo. 515; Regina *v.* Smith, 34 U. C. Q. B. 552; Dedien *v.* People, 22 N. Y. 178; State *v.* Elder, 65 Ind. 282; 32 Am. Rep. 69; Dickey *v.* Comm., 17 Pa. St. 126; 55 Am. Dec. 542.

[6] State *v.* Martin, 30 Wis. 216; 11 Am. Rep. 567; Swinney *v.* State, 8 Smedes & M. 576; Campbell *v.* State, 9 Yerg. 333; 30 Am. Dec. 417; State *v.* Hornsby, 8 Rob. (La.) 583; 41 Am. Dec. 314; State *v.* Norvell, 2 Yerg. 24; 24 Am. Dec. 458; People *v.* Knapp, 26 Mich. 112.

lesser offense to be upon an indictment not charging any higher offense. Here is no acquittal of a higher offense, and yet it would be unjust either to convict and punish defendant for an offense which had been at least partially punished in the sentence imposed for the lesser offense, which was a part of it, and perhaps equally unjust to permit the defendant to atone for the higher offense by suffering the punishment appropriate to the lesser. The courts have leaned to the side of mercy by determining that if the state prosecutes to conviction and sentence for a lesser offense it cannot thereafter convict and punish for a higher crime of which it was a part.[1] Thus where the two prosecutions relate to the same act, a conviction for an attempt to commit rape bars a prosecution for rape;[2] of assault and battery, a prosecution of assault and battery with intent to commit murder;[3] of assault, a prosecution for battery;[4] of petty larceny, a prosecution for grand larceny;[5] of arson, a prosecution for murder, where the penalty imposed for the two crimes is the same;[6] of burglary, a prosecution for robbery.[7] An exception to this rule obtains in the event of the death of an injured person after the conviction of his assailant of assault and battery, in which event a prosecution and conviction for murder or manslaughter may be permitted.[8]

[1] State *v.* Standifer, 5 Port. 523; State *v.* Wister, 62 Mo. 592; State *v.* Sly, 4 Or. 277; Comm. *v.* Hawkins, 11 Bush, 603; State *v.* Chaffin, 2 Swan, 492; Comm. *v.* Miller, 5 Dana, 320; State *v.* Lewis, 2 Hawks, 98; 11 Am. Dec. 741; Roberts *v.* State, 14 Ga. 8; 58 Am. Dec. 528; People *v.* Smith, 57 Barb. 46; Simco *v.* State, 9 Tex. App. 349; State *v.* Smith, 43 Vt. 324; State *v.* Cooper, 13 N. J. L. 371; 25 Am. Dec. 490; Wilcox *v.* State, 6 Lea, 571; 40 Am. Rep. 53; Comm. *v.* Bright, 78 Ky. 238; State *v.* Shepherd, 7 Conn. 54; Moore *v.* State, 71 Ala. 307; Murphy *v.* Comm., 23 Gratt. 960; State *v.* Murray, 55 Iowa, 530; note to Roberts *v.* State, 14 Ga. 8; 58 Am. Dec. 528. *Contra*, State *v.* Stewart, 11 Or. 52; Thomas *v.* State, 40 Tex. 36; Severin *v.* People, 37 Ill. 414; Comm. *v.* Curtis, 11 Pick. 134; State *v.* Warner, 14 Ind. 572.

[2] State *v.* Shepherd, 7 Conn. 54; State *v.* Smith, 43 Vt. 324.

[3] Moore *v.* State, 71 Ala. 307; Regina *v.* Walker, 2 Moody & R. 446.

[4] State *v.* Chaffin, 2 Swan, 493.

[5] State *v.* Murray, 55 Iowa, 530; State *v.* Gleason, 56 Iowa, 203.

[6] State *v.* Cooper, 13 N. J. L. 361; 25 Am. Dec. 496.

[7] Roberts *v.* State, 14 Ga. 8; 58 Am. Dec. 528.

[8] State *v.* Littlefield, 70 Me. 452; 35 Am. Rep. 335; Comm. *v.* Evans, 101 Mass. 25; Regina *v.* Morris, L. R. 1 C. C. 90.

§ 225 a. **Principal and Agent** may both be severally liable on the same obligation, or as the result of the same transaction. Where this is the case, a judgment against the agent seems to preclude the obligee from proceeding against the principal. Hence the recovery on a bill of lading against the master of a ship is a good defense to an action against the owner on the same bill of lading, though satisfaction has not been obtained.[1] This is because the suing of the master to judgment is an election to pursue him, rather than the owner, and makes the latter subject to a recovery against him by the master, and he ought not at the same time to be liable to separate actions in favor of different persons resting upon the same cause.

§ 226. **Principal and Surety.** — In Vermont, a judgment against a principal and his surety merges not only the cause of action, but, as between the plaintiff and the defendant, the relation of principal and surety; so that, at law, the surety cannot avoid the judgment by proving that since its entry some favor or preference has been given the principal, sufficient, if given before the judgment, to relieve the surety from further responsibility.[2] But the preponderance of the authorities is decidedly against the Vermont cases, and in favor of the rule that the judgment creditor is still bound to give no preference to the principal debtor, and to do no act by which the liability of the surety can be increased; and that those acts which are sufficient to discharge the surety before judgment will entitle him to a release afterward, and will constitute a complete defense to an action at law on the judgment.[3]

[1] Priestley *v.* Fernie, 3 Hurl. & C. 977; 11 Jur., N. S., 813; 13 Week. Rep. 1089.

[2] Marshall *v.* Aiken, 25 Vt. 332; Dunham *v.* Downer, 31 Vt. 249.

[3] Rice *v.* Morton, 19 Mo. 263; Commonwealth *v.* Miller's Adm'r, 8 Serg. & R. 452; La Farge *v.* Herter, 11 Barb. 159; Commonwealth *v.* Haas, 16 Serg. & R. 252; Baird *v.* Rice, 1 Call, 18; 1 Am. Dec. 497; Carpenter *v.* King, 9 Met. 511; 43 Am. Dec. 405.

§ 227. **Co-plaintiffs or Co-defendants.** — The merger of the cause of action has no effect upon the liabilities of the co-plaintiffs or the co-defendants between each other.[1] Those liabilities are not in issue in the case, and therefore are not affected by the final determination of the action. In extinguishing a demand, a judgment has no greater effect than mere payment. It leaves the liability of other parties to the defendant unaffected. A recovery upon a note against the maker and indorsers does not so merge the note as to prevent the indorsers from paying the judgment, receiving the note, and maintaining action on it against the maker.[2] So a judgment against co-defendants creates no liability between them, if none before existed. Thus *tort-feasors*, where the injury committed is *malum in se*, have no right of contribution between each other. Hence a judgment recovered against them for such *tort*, and satisfied by one of their number, is wholly incompetent to establish a claim against the others.[3]

§ 227 a. **Suits on Notes and Bills.** — The recovery upon a promissory note, though a merger of the cause of action as between the parties to the suit, is not necessarily a complete merger of all other causes of action which may arise out of the note. Thus the fact that an indorsee has recovered judgment against an acceptor does not prevent a drawer who has taken up the note from recovering another judgment against the same acceptor.[4] So it is no defense to an action by an indorsee against the maker of a note that a prior indorsee, while the holder, and before the plaintiff took it, recovered judgment against defendant and the payee,[5] nor to an action against the maker that there has been a recovery against the indorsers.[6] But if judgment is recovered against one of the joint

[1] *Contra*, Kent *v.* Kent, 82 Va. 205.
[2] Kelsey *v.* Bradbury, 21 Barb. 531; Corey *v.* White, 3 Barb. 12.
[3] Percy *v.* Clary, 32 Md. 245.
[4] Macdonald *v.* Bovington, 4 Term Rep. 825.
[5] McLennan *v.* McMonies, 23 U. C. Q. B. 115; Tarleton *v.* Allhusen, 2 Ad. & E. 32.
[6] Brooklyn C. & N. R. R. Co. *v.* National Bank, 102 U. S. 14.

makers, this is a discharge of all the other makers from all suits by the same plaintiff and all persons in privity with him.[1] If one indebted upon a single cause of action upon which he can be subjected to but one judgment executes in payment thereof several promissory notes, he thereby creates distinct causes of action susceptible of being the foundation of as many judgments as there are notes, and he cannot successfully claim that a judgment upon one of the notes precludes a subsequent recovery on others which were due when the first action was brought.[2]

§ 228. **Judgments against Warrantors, Garnishees, and Stock Companies.** — Judgment against the original warrantor in favor of the last grantee, with satisfaction, will bar any action by the intermediate grantees.[3] In this case it is evident that the demand, which consists of the contract of warranty and the breach thereof, has passed to the last grantee, and is drowned in the judgment. Taking judgment against a garnishee does not merge the demand against the principal. Judgments may be recovered against both, and proceeded upon until one is satisfied.[4] Judgment against a joint-stock company merges the original liability. Redress against the stockholders must, in New York, be procured by an action against them on the judgment.[5] A different opinion is stated by the court in *Young* v. *Rosenbaum*, 39 Cal. 646. Rhodes, C. J., there says that the liability of the stockholders is not merged, extinguished, nor suspended by a judgment against the corporation. The remarks of the court, both in the New York and the California case, so far as applicable to this subject, are mere *dicta*, arising

[1] Barnett *v.* Juday, 38 Ind. 86; Hallowell *v.* MacDonell, 8 U. C. C. P. 21.

[2] Nathans *v.* Hope, 77 N. Y. 420.

[3] Brady *v.* Spurck, 27 Ill. 481.

[4] Price *v.* Higgins, 1 Litt. 273; Cook *v.* Field, 3 Ala. 53; 36 Am. Dec. 436; Brown *v.* Somerville, 8 Md. 444; Hammett *v.* Morris, 55 Ga. 644; Lowry *v.* Lumberman's Bank, 2 Watts & S. 210; Meriam *v.* Rundlett, 13 Pick. 511; Farmer *v.* Simpson, 6 Tex. 303. *Contra*, Sessions *v.* Sessions, 1 Fla. 233; 46 Am. Dec. 339; McAllister *v.* Brooks, 22 Me. 80; 38 Am. Dec. 282; Noble *v.* Merrill, 48 Me. 140; Coburn *v.* Currens, 1 Bush, 242; King *v.* Vance, 46 Ind. 246.

[5] Witherhead *v.* Allen, 28 Barb. 661.

from the consideration of hypothetical facts, and not of the issues before the court. It is a little remarkable that the premises assumed by each court were identical, while the results attained were diametrical. Both judges assumed that the liability of the stockholder was that of a principal debtor, and not that of a surety. But one court treated the case as one in which plaintiff had two distinct causes of action (one against the corporation and one against its stockholders), either of which could be prosecuted to judgment without affecting the other; while in the other court the liability was considered like that of a partnership, in which a recovery against the firm makes each partner responsible under the judgment, and releases him from the original debt.

§ 229. **Collateral Securities.** — The prosecution to judgment of any chose in action, given as collateral security, in no wise merges or discharges the original debt. As the debt continued in full force independent of the security, so it remains unaffected by the judgment, which is the same security in another and higher form.[1] No other cause of action than the one sued upon can merge in the judgment. Hence the successful prosecution of an action on the original debt will not impair the right to proceed upon the security.[2] A judgment against an administrator does not merge his liability so as to prevent the prosecution of an action against the sureties on his bond;[3] and it is said that a judgment in *assumpsit* for money loaned is not a bar to an action on the case for deceit and false and fraudulent representations, made to

[1] Drake *v.* Mitchell, 3 East, 251; Watson *v.* Owens, 1 Rich. 111; Davis *v.* Anable, 2 Hill, 339; Bank of Chenango *v.* Hyde, 4 Cow. 567; Fairchild *v.* Holly, 10 Conn. 475; Butler *v.* Miller, 5 Denio, 159; United States *v.* Hoyt, 1 Blatchf. 326; Butterton *v.* Roope, 3 Lea, 215; 31 Am. Rep. 633; Day *v.* Leal, 14 Johns. 404; Chipman *v.* Martin, 13 Johns. 240.

[2] Fisher *v.* Fisher, 98 Mass. 303; Butler *v.* Miller, 1 N. Y. 496; Steele *v.* Lord, 28 Hun, 127; Harris *v.* Alcock, 10 Gill & J. 226; 32 Am. Dec. 158; Howell *v.* McCracken, 87 N. C. 399; Butterton *v.* Roope, 3 Lea, 215; 31 Am. Rep. 633; White *v.* Smith, 33 Pa. St. 186; 75 Am. Dec. 589; McCullough *v.* Hellman, 8 Or. 191; Burnheimer *v.* Hart, 27 Iowa, 19; 99 Am. Dec. 641.

[3] McLean *v.* McLean, 90 N. C. 530.

procure the loan, though the value of the former judgment must be considered in mitigation of damages.[1] The cases of *Benson* v. *Paine*, 9 Abb. Pr. 28, 17 How. Pr. 407, *Peters* v. *Sanford*, 1 Denio, 224, and *Averhill* v. *Loucks*, 6 Barb. 19, present singular examples of violations of the unquestioned principle of law that the merger of a security does not merge the original debt. In the two cases first named, the plaintiff had taken the note of one partner to secure a debt due from the firm. In the last-named case the plaintiff took a bond and warrant of attorney from one of the partners for a similar purpose. Judgments having been entered in the several cases on the notes and also on the bond, the question arose whether an action could be maintained against the respective copartnerships on the original indebtedness. In each case it was held that the recovery against one partner on the collateral security given by him had merged the demand against the copartnership. But from the opinion of the court in each case the conclusion is irresistible that no question was supposed to be involved, except the effect of the entry of a judgment against a partner for a partnership debt. In each of the three cases, however, a judgment upon a collateral security did in fact bar an action for the original debt; but neither case is authority to overturn the proposition that the merging of a mere security never involves the real indebtedness. We cannot but wonder that three cases involving the same question should be determined in the same state without the attention of either court being directed to a rule of law so familiar to the profession and so decisive of the matters under consideration.

§ 230. **Foreclosure of Security.** — The foreclosing of a mortgage held as security, in a suit in the name of the assignor and the assignee, does not change the relation of the plaintiffs to each other. If the assignee purchase the

[1] Whittier *v.* Collins, 15 R. I. 90; 2 Am. St. Rep. 879.

mortgaged premises at a sale under the decree, he will hold them subject to redemption on the same terms as the mortgage could have been redeemed upon prior to the suit.[1] A judgment or decree of foreclosure does not merge the mortgage debt so as to impair the lien of the mortgage;[2] nor will a proceeding to charge property with the payment of a debt or judgment amount to a merger thereof;[3] nor the recovery of judgment for a debt preclude subsequent proceedings to enforce a mortgage or other lien given to secure its payment.[4] Where parties severally liable on notes secured by a mortgage were all sued in an action to foreclose it, and judgment taken for such foreclosure against all, and a personal judgment against one only, it was held that the others could not be subjected to any further judgment.[5]

§ 231. **Joint Obligors.** — Whenever two or more persons are jointly liable, so that if an action is commenced against any less than the whole number the non-joinder of the others will sustain a plea in abatement, a judgment against any of those so jointly bound merges the entire cause of action. The cause of action being joint, the plaintiff cannot be allowed to sever it against the objection of any of the defendants. By taking judgment against one, he merges the cause of action as to that one, and puts it out of his power to maintain any further suit, either against the others severally or against all combined.[6] A different conclusion was announced by Chief Justice Marshall in the case of *Sheehy* v. *Mandeville*, 6 Cranch, 253. He there held that a judgment against one

[1] Hoyt *v.* Martense, 16 N. Y. 231.

[2] Manns *v.* Bank, 73 Ind. 243; Evansville etc. *v.* State, 73 Ind. 219; 38 Am. Rep. 129.

[3] Roberts *v.* Rice, 71 Ala. 187.

[4] McAlpin *v.* Burnett, 19 Tex. 500; Muncie N. B. *v.* Brown, 112 Ind. 474; Kempker *v.* Comer, 73 Tex. 196.

[5] Lawrence *v.* Beecher, 116 Ind. 312.

[6] People *v.* Harrison, 82 Ill. 84; Sessions *v.* Johnson, 95 U. S. 347; Kendall *v.* Hamilton, L. R. 4 App. Cas. 504; United States *v.* Ames, 100 U. S. 35; Wilson *v.* Buell, 117 Ind. 315; Ferrall *v.* Bradford, 2 Fla. 508; 50 Am. Dec. 293; Jansen *v.* Grimshaw, 125 Ill. 468; Lauer *v.* Bandow, 48 Wis. 638. And perhaps even the presentation and allowance of a claim against the estate of a deceased joint obligor may merge the liability, and release the surviving obligors: Jameson *v.* Barber, 50 Wis. 630.

of the makers of a joint note did not merge it as to the other maker. Notwithstanding the respect everywhere entertained for the opinions of this great jurist, this particular one was rarely assented to in the state courts, was doubted and criticised in England, and, after many years, was directly overruled in the same court in which it was pronounced.[1] The cases in accord with it are few,[2] while those which oppose it are very numerous.[3]

§ 232. **Partners.** — It is well settled that the liability of partners for a debt due from the firm is such that a several action cannot be maintained against each partner, if a plea in abatement is interposed. In case no such plea is made, and a judgment is obtained against one or more of the partners, no further suit can be maintained.[4] This rule in relation to partnerships yields to no hardship. Thus when plaintiff procured one member to confess judgment for the firm, the confessing member was held to be bound by the judgment, whilst his copartners were neither bound by the judgment, nor liable to any other action upon the same liability.[5] And a judgment against the known members of a partnership discharges the secret or dormant members. The fact that plaintiff was not informed as to all the persons bound does not prevent the liability from merging in the recovery.[6] This rule has

[1] Mason *v.* Eldred, 6 Wall. 231.

[2] Treasurers *v.* Bates, 2 Bail. 362; Collins *v.* Lemasters, 1 Bail. 348; 21 Am. Dec. 469, and note; Sneed *v.* Wiester, 2 A. K. Marsh. 277; Union Bank *v.* Hodges, 11 Rich. 480; Beazley *v.* Sims, 81 Va. 644.

[3] Ward *v.* Johnson, 13 Mass. 148; Thomas *v.* Rumsey, 6 Johns. 26; Suydam *v.* Barber, 18 N. Y. 468; 75 Am. Dec. 254; Brady *v.* Reynolds, 13 Cal. 31; Wann *v.* McNulty, 2 Gilm. 355; 43 Am. Dec. 58; Smith *v.* Black, 9 Serg. & R. 142; 11 Am. Dec. 686; Philson *v.* Bamfield, 1 Brev. 202; Benson *v.* Paine, 17 How. Pr. 407; Henderson *v.* Reeves, 6 Blackf. 101; King *v.* Hoare, 2 Dowl. & L. 382; Maghee *v.* Collins, 27 Ind. 83; Kingsley *v.* Davis, 104 Mass. 178; Root *v.* Dill, 38 Ind. 169; Harris *v.* Dunn, 18 U. C. Q. B. 352; Robertson *v.* Smith, 18 Johns. 459; 9 Am. Dec. 227.

[4] Nichols *v.* Burton, 5 Bush, 320; Candee *v.* Clark, 2 Mich. 255; Averill *v.* Loucks, 6 Barb. 19; Mason *v.* Eldred, 6 Wall. 231; Lydam *v.* Cannon, 1 Houst. 431; Woodworth *v.* Spaffords, 2 McLean, 18; Sloo *v.* Lea, 18 Ohio, 279; United States *v.* Trofton, 4 Story, 646; Crosby *v.* Jeroloman, 37 Ind. 276; Ex parte Higgins, 3 De Gex & J. 33.

[5] North *v.* Mudge, 13 Iowa, 496; 81 Am. Dec. 441.

[6] Scott *v.* Colmesnil, 7 J. J. Marsh. 416; Smith *v.* Black, 9 Serg. & R. 142; 11 Am. Dec. 686; Moale *v.* Hollins, 11 Gill & J. 11; 33 Am. Dec. 684; Kendall *v.* Hamilton, L. R. 4 App. Cas. 504.

been violated in South Carolina. Where plaintiff sold goods to A and took his note for the purchase-money, a judgment recovered upon the note was held not to prevent a further action from being sustained against B, who had, since the judgment, been discovered to be A's co-partner.[1] This case is, however, entirely unsupported by authority not likely to be anywhere sustained.

§ 233. **Joint-debtor Acts.**—In some of the states, provisions have been incorporated into the codes of civil procedure authorizing a judgment to be rendered in any action against several persons jointly liable, without service on all of the defendants, such judgment to be satisfied out of the individual property of the defendant served and the joint property of all the defendants. It is further provided, in the states of Michigan and New York, that "such judgment shall be conclusive evidence of the liabilities of the defendant who was served with process in the suit, or who appeared therein, but against every other defendant it shall be evidence only of the extent of the plaintiff's demand after the liability of such defendant shall have been established by other evidence." This clause recognizes the continuance of the liability of a defendant, not served with process, after judgment has been rendered against him as provided in the statute. Its effect, therefore, is to prevent the incident of merger from attaching to the judgment and operating as a release of any defendant who, though a party to, was not personally served in the suit. Such defendant may be subsequently sued, and subjected to a personal judgment.[2] Wherever the statute relating to joint debtors authorizes a judgment to be entered upon the service of process against part only of such debtors, and contemplates that those not served with process shall remain liable, it is evident that a judgment, as to defendants against whom it is not personally

[1] Watson *v.* Owens, 1 Rich. 111; Union Bank *v.* Hodges, 11 Rich. 480.

[2] Oakley *v.* Aspinwall, 4 N. Y. 515; Bonesteel *v.* Todd, 9 Mich. 371; 80 Am. Dec. 90; Mason *v.* Eldred, 6 Wall. 239.

binding, does not merge their liability.[1] In some of the states statutes have been enacted by which liabilities otherwise joint have been made joint and several. Where such is the case, a judgment against one obligor cannot merge or extinguish the liability of another.[2]

§ 234. **Exceptions.** — If, in Indiana, one of the joint promisors dies, and judgment is afterwards obtained against the survivor, who is insolvent, the original debt will furnish a claim liable to be enforced by proceedings against the estate of the deceased.[3] Where a joint promise is made by parties residing in different states, and probably in every case in which it is not possible to bring an action in any court before which all the joint obligors can be compelled to appear, a recovery against those within the jurisdiction of the court will not bar a subsequent action brought against those who were without such jurisdiction.[4] In both of these cases it is evident that some modification of the doctrine of merger is indispensable to secure to plaintiffs the full benefit of their contracts. In the first case the parties liable could not be joined in one action. The plaintiff therefore showed no intention of releasing one party by pursuing the other. In the second case no judgment could be secured in any court, binding on both promisors. To give to a judgment against either the effect of a merger of the cause of action against both would therefore be to require plaintiff, without any fault of his, to abandon his remedy against a part of the co-obligors.

§ 235. **Joint and Several Contractors.** — A judgment against any less than the entire number of persons bound

[1] Rufty *v.* Claywell, 93 N. C. 306; Wooters *v.* Smith, 56 Tex. 198; Ellis *v.* Bone, 71 Ga. 466.

[2] Rufty *v.* Claywell, 93 N. C. 306; Hyman *v.* Stadler, 63 Miss. 362.

[3] Weyer *v.* Thornburgh, 15 Ind. 124; Devol *v.* Halstead, 16 Ind. 287.

[4] Tibbetts *v.* Shapleigh, 60 N. H. 487; Yoho *v.* McGovern, 42 Ohio St. 11; Merriam *v.* Barker, 121 Ind. 74; Eastern T. B. *v.* Bebee, 53 Vt. 177; 38 Am. Rep. 665; Olcott *v.* Little, 9 N. H. 250; 32 Am. Dec. 357; Wiley *v.* Holmes, 28 Mo. 286; 75 Am. Dec. 126; Dennett *v.* Chick, 2 Greenl. 193; 11 Am. Dec. 59; Rand *v.* Nutter, 56 Me. 339; Brown *v.* Birdsall, 29 Barb. 549.

by a several or a joint and several obligation does not release the residue until satisfied.[1] An obligation by which parties bind themselves jointly *and* severally is usually construed as imposing a joint *or* several liability, at the election of the obligee. Therefore if he recovers against the obligors jointly, he cannot afterwards recover severally, and if he recovers severally, he cannot afterwards recover jointly.[2] In Pennsylvania, the plaintiff, by instituting a joint action, is presumed to elect to proceed jointly, and is bound by such election. If, therefore, he accepts judgment against less than the entire number sued, he is not permitted to proceed against the others.[3] The more reasonable view is, that the election is not irrevocable until after judgment has been rendered.[4]

§ 235 a. **Recovery in a Different Right or Capacity.** — A person may sue in different capacities to obtain redress for the same wrongful act. When this is the case, he should be considered as if he were two distinct persons, and his recovery or failure to recover in one capacity cannot affect him when suing in another capacity.[5] A recovery by partners for an injury to their business by certain slanderous words does not merge a cause of action existing in favor of any member of the firm for the injury done him personally by the same words.[6] In this case the injury to either partner as an individual could not have been the subject of a recovery in the former action; and hence it could not be merged in the result of such action. So if, under a statute, a child is entitled to recover for bodily injuries suffered by it, and its father is

[1] Harlan *v.* Berry, 4 G. Greene, 212; McReady *v.* Rogers, 1 Neb. 124; 93 Am. Dec. 333; Elliott *v.* Porter, 5 Dana, 299; Armstrong *v.* Prewett, 5 Mo. 476; 32 Am. Dec. 338; King *v.* Hoare, 13 Mees. & W. 504; Hix *v.* Davis, 68 N. C. 233; Giles *v.* Canary, 99 Ind. 116; Day *v.* Hill, 2 Speers, 628; 42 Am. Dec. 390.

[2] Ex parte Rowlandson, 3 P. Wms. 405; United States *v.* Price, 9 How. 83; Clinton Bank *v.* Hart, 5 Ohio St. 33; Sessions *v.* Johnson, 95 U. S. 347. *Contra*, United States *v.* Cushman, 2 Sum. 426.

[3] Beltzhoover *v.* Commonwealth, 1 Watts, 126; Williams *v.* McFall, 2 Serg. & R. 280.

[4] Clinton Bank *v.* Hart, 5 Ohio St. 33.

[5] Skoglund *v.* Minneapolis S. R'y Co., 45 Minn. 330.

[6] Duffy *v.* Gray, 52 Mo. 528.

also entitled to maintain an action to recover for the loss of the services of the child resulting to him from the same injury, it is clear that a recovery by the child cannot preclude a subsequent recovery by the father;[1] nor can the recovery by the parent, as administrator of the child, preclude his subsequent recovery in an action brought in his own right,[2] nor a recovery in his own right bar his subsequent action as administrator of the child.[3] A judgment in favor of a wife, her husband being joined with her as a nominal party, in an action for personal injuries suffered by her, cannot prevent his recovering for the damages suffered by him from the same cause, such as loss of her labor and companionship, and expenses by him incurred.[4] A judgment in favor of a husband for the possession of goods to which he is entitled by virtue of his marital rights, and for damages, cannot preclude an action by his wife;[5] nor an action for an assault by plaintiff bar a suit by his widow, in the event of his subsequent death, to recover her damages arising from the same assault.[6] If, however, the person in whose favor a former recovery was was entitled to recover all the damages which could be recovered for the act or default complained of, then no further recovery can be had, whether the second action is brought by a different person or not. Thus after a recovery for personal injuries by a person on whom they were inflicted, his representatives cannot, on his subsequent death, maintain an action for the same injuries.[7] So where a beneficial owner of property had recovered for injuries thereto while in his possession, it was held that he could not in another capacity, nor could his trustee, recover damages for the same injury.[8] "A judgment in an

[1] Wilton *v.* Middlesex R. R. Co., 125 Mass. 130; Bridger *v.* Asheville & S. R. R. Co., 27 S. C. 456; 13 Am. St. Rep. 653.

[2] Bradley *v.* Andrews, 51 Vt. 525.

[3] Karr *v.* Parks, 44 Cal. 46.

[4] Mann *v.* City of Rich Hill, 28 Mo. App. 497.

[5] Rogers *v.* Roberts, 53 Md. 519.

[6] Donahue *v.* Drexler, 82 Ky. 157; 56 Am. Rep. 886.

[7] Littlewood *v.* New York, 89 N. Y. 24; 42 Am. Rep. 271.

[8] Colton *v.* Onderdonk, 69 Cal. 155; 58 Am. Rep. 556; Atherton *v.* Atherton, 2 Pa. St. 112; Loeb *v.* Chicago etc. R. R. Co., 60 Miss. 933.

action of *assumpsit* brought by a husband and wife, on a contract by a carrier of passengers to carry the wife safely, for injuries to the wife while being carried, is a bar to another action of *assumpsit* on the same contract, by the husband alone, to recover for the same injuries. A different rule prevails when the action is in tort against the carrier for a breach of public duty, except, perhaps, in states like New Jersey, where by statute the husband may, in such an action, add claims in his own right to those of his wife."[1]

§ 236. **Trespassers.**—The liability of persons joining with one another in the commission of a trespass is joint and several, and the effect of a judgment recovered against them in merging the cause of action is, in America, governed by the rules applicable to judgments upon joint and several contracts.[2] The early English and American authorities sustained an opposite conclusion.[3] In England, after some considerable doubt had been manifested upon this question, the courts decided to follow the early decisions, instead of concurring in the departure taken by the American courts. "We entertain," said Willis, J., in the common pleas, "the highest respect for the American jurists, and are always ready to receive instruction from

[1] Pollard *v.* R. R. Co., 101 U. S. 223.

[2] Elliott *v.* Porter, 5 Dana, 299; 75 Am. Dec. 689; Blann *v.* Crocheron, 19 Ala. 647; 54 Am. Dec. 203; State *v.* Boyce, 72 Md. 140; 20 Am. St. Rep. 458; Hyde *v.* Noble, 13 N. H. 494; 38 Am. Dec. 508; 2 Hilliard on Torts, 310, 311; Elliott *v.* Hayden, 104 Mass. 180; Morgan *v.* Chester, 4 Conn. 387; Matthews *v.* Menedger, 2 McLean, 145; Bloss *v.* Plymale, 3 W. Va. 403; 100 Am. Dec. 752; Livingston *v.* Bishop, 1 Johns. 290; 3 Am. Dec. 330; United Society *v.* Underwood, 21 Am. Rep. 214; 11 Bush, 265; Knight *v.* Nelson, 117 Mass. 458; Ayer *v.* Ashmead, 31 Conn. 447; 83 Am. Dec. 154; Wright *v.* Lathrop, 2 Ohio, 33; 15 Am. Dec. 529; Sheldon *v.* Kibbe, 3 Conn. 214; 8 Am. Dec. 176; Turner *v.* Hitchcock, 20 Iowa, 310; McGehee *v.* Shafer, 15 Tex. 198; Stone *v.* Dickinson, 5 Allen, 29; 81 Am. Dec. 727; Atlantic D. Co. *v.* Mayor, 53 N. Y. 64; Guelle *v.* Swan, 19 Johns. 381; 10 Am. Dec. 234; Hawkins *v.* Hatton, 1 Nott & McC. 318; 9 Am. Dec. 700; Jack *v.* Hudnall, 25 Ohio St. 255; 18 Am. Rep. 298; Maple *v.* Cincinnatti etc. R. R. Co., 40 Ohio St. 313; 48 Am. Rep. 685.

[3] Lendall *v.* Pinfold, 1 Leon. 19; Chitty's Pleading, 89, citing Cro. Jac. 74, 2 Bos. & P. 70, 71, and 1 Saund. 207 a; Broome *v.* Wooton, Cro. Jac. 73; Yelv. 67; Warden *v.* Bailey, 4 Taunt. 88; King *v.* Hoare, 13 Mees. & W. 494. These cases are also sustained by several American decisions: Hunt *v.* Bates, 7 R. I. 217; 82 Am. Dec. 592; Wilkes *v.* Jackson, 2 Hen. & M. 355.

their decisions upon questions of general law. But the question whether a plaintiff is to be allowed to maintain a second action against one whom he ought to have sued jointly with another in a former action, is purely one of procedure, and on such a question we are bound by the authorities in our own courts."[1] This decision of the common pleas, subsequently coming on to be reviewed in the exchequer chamber, was affirmed, on the ground that it was sustained by principle as well as by precedent. Kelly, C. B., in the beginning of his opinion, in considering the question upon principle, reasoned as follows: "The defendant, by way of plea, alleges that an action was brought for the same cause against the other wrong-doer, and a judgment obtained against her, which remains in full force; and the question is, whether that affords any defense to this action. That a judgment and execution with satisfaction would be a defense is not disputed. A long series of authorities has so laid down; but it was doubted whether judgment and execution without satisfaction was a bar also. It will be right, therefore, to consider whether this latter is not, upon principle, a good and valid defense. If it were held not to be a defense, the effect would, in the first place, be to encourage any number of vexatious actions whenever there happened to be several joint wrong-doers. An unprincipled attorney might be found willing enough to bring an action against each and every of them, and so accumulate a vast amount of useless costs, if judgment against one of them did not operate as a bar to proceedings against the others. The mischief would not even rest there. Judgment having been recovered against one or more of the wrong-doers, and damages assessed, if that judgment afforded no defense, the plaintiff might proceed to trial against another of them, and the second jury might assess a different amount of damages. Which amount is the plaintiff to

[1] Brinsmead *v.* Harrison, L. R. 7 Com. P. 551. See also Sloan *v.* Creasor, 22 U. C. Q. B. 130.

levy? There are other grounds upon which it would be extremely inconvenient and unjust if a second action could be maintained. But, independently of the mischief which would result from holding the law to be as contended for, let us see how the authorities stand. In the first place, there is no authority whatever—since the reigns of the Henrys and the Edwards nothing approaching to an authority has been cited—to show that such a plea as this would not be a good defense. In the absence, therefore, of authority to the contrary, upon principle, and upon what I conceive to be binding authority in its favor, I come to the conclusion that such a plea as this affords a good defense."[1]

But, with all due deference to so high an authority, it strikes us that, while professing to discuss this question upon *principle*, the chief baron discussed it only with reference to considerations of hardship and inconvenience. The only way in which it can be discussed upon principle is to demonstrate that the cause of action is *joint*, and not *joint and several*. This the chief baron did not attempt. If considerations of convenience are to govern in determining the application of the law of merger, it might be denied in many instances, where the liability is clearly joint and several. By way of illustration, suppose that one of the makers of a joint and several note, on being sued thereon, interposes a defense, and upon the trial of the cause the jury allows the defense, in whole or in part. Another action may then be brought against the other promisor; he may interpose the same defense, and support it by the same evidence, and yet the jury before whom the second action is tried may find a verdict entirely different from that found in the first action. In such case, the plaintiff would, no doubt, take out execution on the judgment which happened to be most favorable to his interests. Or suppose the note to be made by

[1] Brinsmead *v.* Harrison, L. R. 7 Com. P. 557. See also Sloan *v.* Creasor, 22 U. C. Q. B. 130.

twenty joint and several promisors. In that event, it is possible that the payee might find an attorney willing, or even anxious, to prosecute twenty separate suits, and in each suit to incur and tax the largest amount of costs allowable by law. In fact, the inconvenience and injustice of allowing several judgments to be recovered upon any joint and several liability are as likely to arise in suits upon promissory notes as in actions to recover for trespasses and torts committed by two or more persons. If hardship and inconvenience control the judgment of the court in the latter class of actions, they ought equally to control in the former.

A few of the American cases, while admitting that the successful prosecution of an action against one trespasser does not affect the cause of action against his co-trespassers, decide that the mere issuing of an execution is a conclusive election to consider the defendant as exclusively responsible.[1] But a majority of them[2] discountenances this manifest absurdity. If the mere election to pursue one trespasser were binding on the plaintiff as a release of all the co-trespassers, it seems difficult to understand why that election is not as obvious when the suit has been prosecuted to final judgment as when the plaintiff takes the first step towards its enforcement. If, on the other hand, such election in no way involves the several causes of action against the other trespassers prior to the issuing of an execution, it is difficult to perceive why or how that event necessarily involves them. How vain and delusive that law must be which declares the right of an injured party to proceed severally against every person concerned

[1] Allen *v.* Wheatley, 3 Blackf. 332; Fleming *v.* McDonald, 50 Ind. 278; 19 Am. Rep. 711; White *v.* Philbrick, 5 Greenl. 147; 17 Am. Dec. 214; Smith *v.* Singleton, 2 McMull. 184; 39 Am. Dec. 122.

[2] Murray *v.* Lovejoy, 2 Cliff. 191; Sheldon *v.* Kibbe, 3 Conn. 214; 8 Am. Dec. 176; Sanderson *v.* Caldwell, 2 Aiken, 195; Sharp *v.* Gray, 5 B. Mon. 4; Jones *v.* McNeal, 2 Bail. 466; Lovejoy *v.* Murray, 3 Wall. 1; Page *v.* Freeman, 19 Mo. 421; Floyd *v.* Browne, 1 Rawle, 125; 18 Am. Dec. 602; Knott *v.* Cunningham, 2 Sneed, 204; Griffie *v.* McClung, 5 W. Va. 133; Osterhout *v.* Roberts, 8 Cow. 43; McVey *v.* Marratt, 80 Iowa, 132; Blann *v.* Crocheron, 20 Ala. 320; 54 Am. Dec. 203.

in committing an injury; which sustains him until the liability of every wrong-doer is severally determined and evidenced by a final judgment; and which, after thus "holding the word of promise to his ear, breaks it to his hope," by forbidding him to attempt the execution of either judgment, upon penalty of releasing all the others. Plaintiff can have but one satisfaction for each trespass, whether he has recovered several judgments or none. Such satisfaction abates all actions pending, and discharges all judgments obtained, against co-trespassers,[1] except as to costs, which, it seems, may be collected upon each judgment.[2] Pursuing trespassers, or any of them severally, is a conclusive election to consider the trespass as several, and is a bar to a joint action subsequently instituted.[3]

§ 237. **Vesting Title.** — Where, instead of suing for the mere damages occasioned by an act of trespass or conversion, the plaintiff recovers judgment for the value of the property injured or converted, it has frequently been held that the recovery vests the title to the property in the defendant, and that as it would be unjust for the defendant to acquire title to the property taken or injured, while others might be made liable to pay the entire value thereof in a subsequent action, the plaintiff could not be allowed to proceed against any person concerned in the trespass or conversion and not included in the first action.[4] If, indeed, the mere rendition of a judgment transferred the

[1] Mitchell *v.* Libbey, 33 Me. 74; Matthews *v.* Lawrence, 1 Denio, 212; 43 Am. Dec. 665; Smith *v.* Singleton, 2 McMull. 184; 39 Am. Dec. 122; Savage *v.* Stevens, 128 Mass. 254; Luce *v.* Dexter, 135 Mass. 23; Hawkins *v.* Hatton, 1 Nott & McC. 318; 9 Am. Dec. 700.

[2] Livingston *v.* Bishop, 1 Johns. 290; 3 Am. Dec. 330; Knickerbocker *v.* Colver, 8 Cow. 111; First N. B. *v.* Piano Co., 45 Ind. 5; Ayer *v.* Ashmead, 31 Conn. 447; 83 Am. Dec. 154; Sodousky *v.* McGee, 4 J. J. Marsh. 267.

[3] Murray *v.* Lovejoy, 2 Cliff. 191; Smith *v.* Rines, 2 Sum. 348.

[4] Campbell *v.* Phelps, 1 Pick. 61; 11 Am. Dec. 139; Broome *v.* Wooton, Yelv. 67; Adams *v.* Broughton, 2 Strange, 1078; Floyd *v.* Browne, 1 Rawle, 121; 18 Am. Dec. 602; Woolley *v.* Carter, 7 N. J. L. 85; 11 Am. Dec. 520; White *v.* Philbrick, 5 Greenl. 147; 17 Am. Dec. 214; Emery *v.* Nelson, 9 Serg. & R. 12; Buckland *v.* Johnson, 15 Com. B. 145; 23 L. J. Com. P. 204. This last case has been overruled by Brinsmead *v.* Harrison, L. R. 6 Com. P. 588.

title of the property in such cases to defendant, the plaintiff's cause of action would of course cease to be held by him, and his claim to further proceedings based upon it could not be supported. But the American courts have not generally attributed this effect to judgments. The transfer of title, in their opinion, does not take place until the judgment is completely satisfied, and the value of the property as ascertained by the court has been paid to the plaintiff. Until such payment, therefore, there is no obstacle to prevent him from seeking redress in the courts against any one originally liable.[1] But when the judgment has been paid, the title to the property is, for most purposes, vested in the defendant by relation at the date of the conversion. The plaintiff elects by his proceeding against the defendant to compel the latter to become a purchaser of the property and to pay its value at the date of the conversion. When the plaintiff has succeeded in compelling this involuntary purchase and payment, the title thereby acquired by the defendant relates back to the date of the conversion, because that is the period at which the plaintiff has chosen to treat the property as purchased from him by the defendant.[2] Therefore if after recovering judgment for the conversion of certain chattels, the plaintiff retakes the same chattels into his possession, and subsequently to such retaking he enforces the collection of the judgment, such collection vests the property in the defendant as of the date of the original conversion, and entitles him to recover against the plaintiff for the retaking.[3] But the relation of title back to the period of the conversion will not be permitted to take effect to the

[1] Osterhout *v.* Roberts, 8 Cow. 43; Spivey *v.* Morris, 18 Ala. 254; 52 Am. Dec. 224; Smith *v.* Alexander, 4 Sneed, 482; Sanderson *v.* Caldwell, 2 Aiken, 203; Jones *v.* McNeil, 2 Bail. 466; Morgan *v.* Chester, 4 Conn. 387; Matthews *v.* Menedger, 2 McLean, 145; Hyde *v.* Noble, 13 N. H. 501; McGee *v.* Overby, 12 Ark. 164; Sharp *v.* Gray, 5 B. Mon. 4; Hepburn *v.* Sewell, 5 Har. & J. 212; 9 Am. Dec. 512; Lovejoy *v.* Murray, 3 Wall. 1; Elliott *v.* Hayden, 104 Mass. 180; Smith *v.* Smith, 50 N. H. 219; McReady *v.* Rogers, 1 Neb. 124; 93 Am. Dec. 333; St. Louis etc. R'y Co. *v.* McKinsey, 78 Tex. 298; 22 Am. St. Rep. 54.

[2] Hepburn *v.* Sewell, 5 Har. & J. 211; 9 Am. Dec. 512.

[3] Smith *v.* Smith, 51 N. H. 571; 50 N. H. 219.

prejudice of innocent third persons so as to make them liable as trespassers.[1]

§ 238. **Divisible and Indivisible Causes of Action.** — That a single or entire demand cannot be split so as to constitute the basis of more than one suit, and that the recovery upon any part of such demand merges the whole, is not disputed,[2] although the plaintiff may have assigned some portion thereof to a third person.[3] It is equally certain that one person may, at the same time, hold several distinct causes of action against another, and may maintain an action on any of such causes, without prejudicing his right to proceed upon any of the others.[4] Thus a recovery of damages for the wrongful dismissal of the plaintiff from defendant's employment does not bar a subsequent action for wages earned during such employment;[5] nor a recovery for money deposited with defendant in an action for wages due to him.[6] A recovery for money lent does not bar an action for fraudulent representations made to procure the loan;[7] a judgment in favor of an interpleader in an attachment suit does not affect his cause of action against an officer for a wrongful seizure;[8] a recovery in *assumpsit* on a written contract relating to the sale of sheep does not bar a subsequent action of trover for their value.[9]

Great difficulty has been experienced in determining what constitutes an entire or single demand; and many irreconcilable adjudications have been made upon the subject. It may be laid down as a general rule that each separate agreement or transaction will give rise to one

[1] Bacon *v.* Kimmel, 14 Mich. 201.

[2] Staples *v.* Goodrich, 21 Barb. 317; Waterbury *v.* Graham, 4 Sand. 215; Warren *v.* Comings, 6 Cush. 103; Smith *v.* Jones, 15 Johns. 229; Marsh *v.* Pier, 4 Rawle, 273; 26 Am. Dec. 131; Crosby *v.* Jeroloman, 37 Ind. 277; Dutton *v.* Shaw, 35 Mich. 431; Guernsey *v.* Carver, 8 Wend. 492; 24 Am. Dec. 60; Turner *v.* Plowden, 5 Gill & J. 52; 23 Am. Dec. 596.

[3] Ingraham *v.* Hall, 11 Serg. & R. 78.

[4] Robbins *v.* Harrison, 31 Ala. 160; Rex *v.* Sheriff, 1 Barn. & Adol. 672; Wittick *v.* Traum, 27 Ala. 563; 62 Am. Dec. 778.

[5] Perry *v.* Dickerson, 85 N. Y. 345; 35 Am. Rep. 663.

[6] Byrnes *v.* Byrnes, 102 N. Y. 4.

[7] Whittier *v.* Collins, 15 R. I. 90; 2 Am. St. Rep. 879.

[8] Clark *v.* Brott, 71 Mo. 473.

[9] Gates *v.* Goreham, 5 Vt. 317; 26 Am. Dec. 303.

entire and independent cause of action, *and to but one.* Thus if several parcels of merchandise be sold at one time, the transaction will constitute but one demand.[1] A note payable in one year, with interest payable semi-annually, comprises two distinct contracts, — one to pay the principal sum and the other to pay the interest. A judgment, after the principal is due, in an action for interest, does not merge both contracts.[2] F. discounted a bill drawn by J. upon A., and J. and A. agreed at the same time that in case the bill was not paid at maturity they would pay thereon twenty pounds for each month, and F. sued J. on the bill, claiming no interest, and recovered. It was afterwards held that the agreement to pay twenty pounds per month interest was a distinct agreement, upon which F. could recover in another action for every month until the bill had merged into the judgment obtained upon it.[3] A note signed by A B & Co. and by A B furnishes two causes of action, — one against A B and the other against the firm. Each cause of action may be recovered upon severally.[4] Where the law provided that the plaintiff should have judgment in certain cases, unless an affidavit of defense was filed, the defendant having filed such affidavit as to part of the claim, the plaintiff took judgment for the balance. The court thereupon held that there could be but one final judgment in an action, and that plaintiff was precluded from proceeding for the disputed portion of the claim.[5]

§ 239. **Actions on Account.** — In actions for goods sold, for money loaned and received, or for labor performed, at

[1] Smith *v.* Jones, 15 Johns. 229.

[2] Andover Sav. Bank *v.* Adams, 1 Allen, 28; Dulaney *v.* Payne, 101 Ill. 325; 40 Am. Rep. 205; Sparhawk *v.* Wills, 6 Gray, 163. The case of Howe *v.* Bradey, 19 Me. 31, is sometimes cited as sustaining a different view; and perhaps it inferentially does. But that case did not involve any question concerning the effect of a recovery for interest. It merely determined that such a recovery was improper after the principal became due. The dissenting opinion of Judge Emery appears to us to be more in consonance with reason and authority than the opinion of the majority as delivered by Judge Shepley.

[3] Florence *v.* Jenings, 2 Com. B., N. S., 454.

[4] Gilman & Co. *v.* Foote & Co., 22 Iowa, 560.

[5] Brazier *v.* Banning, 20 Pa. St. 345.

various times, the whole sum due at the commencement of the suit probably constitutes but one demand. It is said to be reasonable for the courts to presume, in such cases, that an agreement existed in pursuance of which the plaintiff, for a definite period of time, or at the will of both parties, was to furnish goods, to loan money, or to perform labor; and that the amount due under the agreement should constitute but one cause of action.[1] The amounts due upon a book-account are generally regarded as constituting an indivisible demand.[2] What is an account or a dealing upon account is difficult to state, and is probably a question of fact to be determined from all the circumstances. Doubtless where the parties are merchant and customer, or are regularly doing business with each other, under circumstances calling for the keeping of accounts, the debtor has a right to have his entire indebtedness treated as one and indivisible. And generally, where a creditor seeks to recover two or more judgments for items of indebtedness due him when the first action was brought, he must show some reason why such indebtedness should be treated as divisible. The question is one of agreement or understanding, express or implied, to be determined by the ordinary modes of business,[3] or by the direct agreement of the parties. Thus where one person is furnishing articles to another, and they agree that bills are to be made out and due and payable at the end of each month, this has been held to give rise to a separate cause of action at the end of each month, and to warrant two separate actions and recoveries for the amounts due at the end of two months, though both were due before either action was brought.[4] Some courts, how-

[1] Secor *v.* Sturgis, 16 N. Y. 548; Bunnell *v.* Pinto, 2 Conn. 431; Pinney *v.* Barnes, 17 Conn. 420; Lucas *v.* Le Compte, 42 Ill. 303.

[2] Avery *v.* Fitch, 4 Conn. 362; Lucas *v.* Le Compte, 42 Ill. 303; 2 Smith's Lead. Cas. 671; Bendernagle *v.* Cocks, 19 Wend. 257; 32 Am. Dec. 448; Oliver *v.* Holt, 11 Ala. 574; 46 Am. Dec. 228; Memmer *v.* Carey, 30 Minn. 458; Corey *v.* Miller, 12 R. I. 337; Stevens *v.* Lockwood, 13 Wend. 644; 28 Am. Dec. 492.

[3] Pittman *v.* Chrisman, 59 Miss. 126; Magruder *v.* Randolph, 77 N. C. 79; Borngesser *v.* Harrison, 12 Wis. 544; 78 Am. Dec. 757; Buck *v.* Wilson, 113 Pa. St. 423.

[4] Beck *v.* Devereaux, 9 Neb. 109.

ever, consider each separate charge as a distinct cause of action, not to be affected by proceedings for the recovery of other charges, antecedent or subsequent.[1] A contract to pay the hire of a horse and buggy is so distinct from the implied obligation to pay for damages thereto during the period of the hiring that judgment for the hire does not affect the claim for damages.[2]

§ 240. **Indivisible Demands.** — Where the action is upon a contract, it merges all amounts due under or arising out of the contract prior to the suit. They constitute a single, indivisible demand.[3] If a railroad company agrees to build a crossing, this cannot be distinguished from a covenant to do any other act. Upon a breach of the covenant, by a failure to erect the crossing, the covenantor may bring an action. The judgment obtained in such action will be considered as a full compensation for all damages which have arisen or which may arise from the breach of the covenant; and the plaintiff cannot therefore recover for any damages sustained by him subsequently to the former recovery.[4] If a bond is given to a constable to indemnify him from all damages, charges, trouble, and expense that he may be put to by reason of a levy upon and sale of specified property, all these items constitute a single demand.[5]

If one has hired property of or is himself working for another for a compensation to be paid at regular intervals, as by the week or month, whatever is due him at any one time, though it may be made up of wages due for two or more months or years, is regarded as due upon one contract, and therefore not subject to separate actions, and a

[1] Rex *v.* Sheriff, 1 Barn. & Adol. 672; McIntosh *v.* Lown, 49 Barb. 550.

[2] Shaw *v.* Beers, 25 Ala. 449.

[3] Goodrich *v.* Yale, 97 Mass. 15; O'Beirne *v.* Lloyd, 43 N. Y. 248; Hopf *v.* Myers, 42 Barb. 270; Warren *v.* Comings, 6 Cush. 103; Dalton *v.* Bentley, 15 Ill. 420; Chinn *v.* Hamilton, Hemp. 438; Draper *v.* Stouvenel, 38 N. Y. 219; Sykes *v.* Gerber, 98 Pa. St. 179; Rosenmueller *v.* Lampe, 89 Ill. 212; 31 Am. Rep. 74; Joyce *v.* Moore, 10 Mo. 271.

[4] Indiana B. R. R. Co. *v.* Koons, 105 Ind. 507; Smith *v.* Great Western R'y Co., 6 U. C. C. P. 156; citing Manning *v.* Eastern Counties R'y Co., 12 Mees. & W. 237.

[5] Bancroft *v.* Winspear, 44 Barb. 209.

recovery for any month or year precludes any further recovery for wages due when the action was brought, whether earned before or after those for which a recovery was had;[1] or if the contract was for a year or other stated time, and the employee is wrongfully discharged, and before the expiration of the year sues for and recovers part of his wages, or damages for his dismissal, his entire claim is thereby merged.[2] If, by virtue of a lease or contract, moneys become due in installments or at regular intervals, a recovery of any installment merges any other due at the time of the commencement of the action,[3] but does not affect installments subsequently falling due.[4] Therefore if a bond of indemnity is given, a judgment for a breach thereof cannot merge a cause of action arising out of a subsequent breach.[5] Though a note under which interest falls due in installments declares that if any installment is not paid when due the entire principal shall become due, a recovery of interest does not merge the principal.[6] Where there is a continuing covenant, such, for instance, as a covenant for repairs, a recovery thereon will not destroy or affect the plaintiff's right to recover damages occasioned by a breach of covenant occurring subsequently to the commencement of the prior action.[7] An extreme application of the rule that but one cause of action can arise from an entire contract occurred in a case in Ohio, in which it appeared that the owner of a barge entered into a contract declaring that he had hired it to the owners of a steamer "for the sum of ten dollars per day, until delivered back in like good order as received." After his barge had been retained in the service of the owners of the steamer for a considerable

[1] Rosenmueller *v.* Lampe, 89 Ill. 212; 31 Am. Rep. 74; Stein *v.* The Prairie Rose, 17 Ohio St. 475; 93 Am. Dec. 631.

[2] Booge *v.* Pacific R. R. Co., 33 Mo. 212; 82 Am. Dec. 160; Kahn *v.* Kahn, 24 Neb. 709.

[3] Perry *v.* Mills, 76 Iowa, 622.

[4] Burritt *v.* Belfy, 47 Conn. 323; 36 Am. Rep. 79; Hamm *v.* Beaver, 31 Pa. St. 58; Armfield *v.* Nash, 31 Miss. 361; Epstein *v.* Greer, 85 Ind. 372; Ahl *v.* Ahl, 60 Md. 207; Clark *v.* Jones, 1 Denio, 519; 43 Am. Dec. 706.

[5] Orendorff *v.* Utz, 48 Md. 298.

[6] Wehrly *v.* Morfoot, 103 Ill. 183.

[7] Beach *v.* Crain, 2 N. Y. 86; 49 Am. Dec. 369; Fish *v.* Folley, 6 Hill, 54.

period of time, he brought an action against them, and recovered the amount due up to the commencement thereof. At a subsequent date he brought another action, to recover an amount alleged to have become due him for the hire of the barge after the commencement of the former action. Thereupon the court determined that the contract was entire for the use of the barge to be returned in a reasonable time; that if it were not so returned there might be an action for breach of contract for its return; that the right of the party was, not to exact ten dollars per day perpetually, but to charge that for a reasonable time; that his former action, in effect, averred that the reasonable time had expired, and that the whole debt was then due, and therefore that his former recovery merged his entire claim to recover for the use of his barge under the contract.[1]

Judgment for a breach of a covenant in a lease is a bar to an action for any other breach previously committed.[2] This doctrine, though well sustained, is pronounced heretical in *McIntosh* v. *Lown*, 49 Barb. 550, where the extreme ground is attempted to be maintained that each successive breach of any contract constitutes an independent cause of action, so that a plaintiff, after recovering for one breach of a covenant in his lease, is at liberty to recover damages for any preceding breach. To the same effect is the opinion in the case of *Badger* v. *Titcomb*, 15 Pick. 409; 26 Am. Dec. 611. There the defendant, being the keeper of an office for procuring crews for vessels, agreed to pay plaintiff a specified sum for each man shipped. The court decided that the plaintiff could maintain an action for the breach of this contract, occurring antecedent to another breach, upon which judgment has been obtained.[3] Of course the recovery upon a contract does not affect any distinct cause of action subsequently accruing. Thus an

[1] Stein *v.* The Prairie Rose, 17 Ohio St. 475; 93 Am. Dec. 631.

[2] Bendernagle *v.* Cocks, 19 Wend. 207; 32 Am. Dec. 448; Fish *v.* Folley, 6 Hill, 54; Stuyvesant *v.* Mayor of N. Y., 11 Paige, 414.

[3] Perry *v.* Harrington, 2 Met. 368; 37 Am. Dec. 98.

indorser who, upon being compelled to pay part of a note, recovers the amount paid, from a second indorser, will, when obliged to pay the balance, be in condition to successfully prosecute another action against the second indorser.[1] Presenting an entire demand as a defense to an action or as a set-off, and its partial allowance, merges the whole demand. When the set-off, being fully established, exceeds the plaintiff's demand, the defendant cannot in a subsequent action recover the excess.[2]

§ 241. **Indivisible Demands Ex Delicto.** — The rule that one cause of action cannot be split into several is as applicable to actions *ex delicto* as to those *ex contractu*. A single tort can be the foundation for but one claim for damages.[3] A judgment for plaintiff in replevin for a portion of the things taken is a bar to a subsequent action for damages for the same taking, it not being shown that any of the things not recovered in the former action were concealed or so disposed of that as to them the replevin would not lie.[4] The rule is without exception that if several chattels are taken at the same time, a recovery of any of them, whether in trespass or in trover, merges the entire demand arising out of the taking, and no further recovery can be had in any form of action.[5] The propriety of this rule is manifest. To allow as many suits to be prosecuted as there are articles taken or detained by the defendant would be to inflict upon him a penalty more serious than any authorized by the penal laws, and to obstruct the tribunals of justice with a cloud of petty cases, supported by the same facts and involving the same legal principles. "It would be outrageous to allow a

[1] Wright *v.* Butler, 6 Wend. 284; 21 Am. Dec. 323.

[2] Simes *v.* Zane, 24 Pa. St. 242; Inslee *v.* Hampton, 11 Hun, 156; O'Connor *v.* Varney, 11 Gray, 231.

[3] Wichita & W. R. R. Co. *v.* Beebe, 39 Kan. 465; Saddler *v.* Apple, 9 Humph. 342; Whitney *v.* Clarendon, 18 Vt. 252; 46 Am. Dec. 150; Karhler *v.* Dobberpuhl, 60 Wis. 256.

[4] Bennett *v.* Hood, 1 Allen, 47; 79 Am. Dec. 105; Herriter *v.* Porter, 23 Cal. 385.

[5] Union R. R. Co. *v.* Traube, 59 Mo. 355; O'Neal *v.* Brown, 21 Ala. 482; McCaffrey *v.* Carter, 125 Mass. 330.

thousand actions for taking a thousand barrels of flour."[1] When a house and a shop were burned by the same fire, through the negligence of defendant's servants, a judgment for the damages occasioned by the burning of the shop was adjudged to be a bar to a recovery, in a subsequent action, for the destruction of the house.[2] If the defendant stopped the plaintiff's wagon and team and forcibly took a horse therefrom, and the plaintiff sued in trover and recovered for the taking of the horse, he cannot thereafter recover in trespass for his injuries suffered from the stopping of the wagon and team, for all that the defendant did was but one continuous tortious act.[3] After recovering judgment for malicious prosecution, the plaintiff cannot sustain an action for slander, consisting of preferring the charge on which the malicious prosecution took place; but slander consisting of subsequent repetitions of the charge is not merger in the judgment for malicious prosecution.[4] All the damages which can by any possibility result from a single tort form an indivisible cause of action.[5] Every cause of action in tort consists of two parts, to wit, the unlawful act, and *all* the damages which *can* arise out of it. For damages *alone*, no action can be permitted. Hence if a recovery has once been had for the unlawful act, no subsequent suit can be sustained. There must be a fresh act as well as a fresh damage.[6] A recovery in trover for the conversion of slaves is a bar to any claim, either for trespass in forcibly taking them, or in *assumpsit* for the value of their

[1] Farrington *v.* Payne, 15 Johns. 432; 8 Am. Dec. 261; Bates *v.* Quattlebone, 2 Nott & McC. 205; Cracraft *v.* Cochran, 16 Iowa, 301; Cunningham *v.* Harris, 5 Cal. 81; Veghte *v.* Hoagland, 29 N. J. L. 125; Buckland *v.* Johnson, 15 Com. B. 145. A recovery for the conversion of certain chattels bars any subsequent recovery for other chattels converted by the same act, although the plaintiff was prevented from including them in the former suit, by the fraud of the defendant: McCaffrey *v.* Carter, 125 Mass. 330.

[2] Trask *v.* Railroad, 2 Allen, 331.

[3] Hite *v.* Long, 6 Rand. 457; 18 Am. Dec. 719.

[4] Rockwell *v.* Brown, 36 N. Y. 207; Jarnigan *v.* Fleming, 43 Miss. 710; 5 Am. Rep. 514; Sheldon *v.* Carpenter, 4 N. Y. 579; 55 Am. Dec. 301.

[5] Norton *v.* Doherty, 3 Gray, 372; 63 Am. Dec. 758; Stickney *v.* Goudy, 132 Ill. 213.

[6] Hodsoll *v.* Stallebrass, 11 Ad. & E. 301.

services during the period of their conversion.[1] Judgment upon contract for breach of agreement in not discharging an execution merges the claim for damages occasioned by an arrest under the same execution.[2] If a fire is started by a locomotive-engine under such circumstances as to make its owner answerable, all damages resulting to one person by the act must be recovered in one judgment, although the fire was communicated to two tracts of land situate a considerable distance from each other.[3] A recent case is difficult to reconcile with the principle we have here stated and illustrated. A husband and wife, while riding as passengers in a railway car, suffered injuries from the same negligence. He brought an action and recovered judgment for his personal injuries, and thereafter commenced another action, seeking compensation for the loss of the services and society of his wife, caused by her being injured at the same time with him, and for the expense to which he was put in providing her with physicians, medicines, and care. The former recovery being pleaded in bar, the appellate court decided the plea not to be sustained, on the ground that to entitle him to recover in the former action, it was not necessary for him to show that he had lost the society or services of his wife, or that she had been injured; that the loss of the services and society of his wife was an entirely different cause of action from the injury to himself, and did not occur until after such injury, nor result therefrom or pertain thereto.[4]

The fact that the damages now sought to be compensated had not become apparent when the former judgment was obtained does not form any exception to the rule.[5] Thus where the defendant had made an excavation into

[1] Cook *v.* Cook, 2 Brev. 349; Thompson *v.* Rogers, 2 Brev. 410; Yowle *v.* N. H. & N. Co., 107 Mass. 352; Smith *v.* G. W. R'y Co., 6 U. C. C. P. 156.

[2] Smith *v.* Way, 9 Allen, 472.

[3] Knowlton *v.* N. Y. & N. E. R. R. Co., 147 Mass. 606.

[4] Skoglund *v.* Minneapolis Street R'y Co., 45 Minn. 339; 22 Am. St. Rep. 733.

[5] Watson *v.* Van Meter, 43 Iowa, 76; Fowle *v.* New Haven, 107 Mass. 352; Clegg *v.* Dearden, 12 Q. B. 576.

plaintiff's coal mine, through which water flowed, and plaintiff recovered damages for making the aperture, and afterward brought another action to obtain compensation for damages occasioned by the flowing of water through the opening into his mine, it was held that as defendant was under no legal obligation to close the excavation, no fresh act had been done, and no further suit could be maintained.[1] In this case the damages upon which the second suit was based, though accruing subsequent to the commencing of the first suit, were the natural and inevitable result of the excavation. The absence of that fact, however, would not have changed the result. The rule yields to no hardship. Unforeseen and improbable injuries resulting from any act are, equally with existing and probable injuries, parts of an inseverable demand. After judgment recovered for an assault and battery, parts of the plaintiff's skull came out, and he sought to recover for the damage thus occasioned, and it was decided that he could not, because the defendants had not committed any fresh wrong.[2] The principles of this case were affirmed by a majority of the judges of the supreme court of Vermont.[3]

[1] Watson *v.* Van Meter, 43 Iowa, 76; Fowle *v.* New Haven, 107 Mass. 352; Clegg *v.* Dearden, 12 Q. B. 576.

[2] Fetter *v.* Beale, Salk. 11.

[3] Whitney *v.* Town of Clarendon, 18 Vt. 252; 46 Am. Dec. 150. A somewhat extreme application of the rule that from one tort but one cause of action can arise was made in Beronio *v.* Southern Pac. R. R. Co., 86 Cal. 415; 21 Am. St. Rep. 57. The plaintiff sued to recover damages for the construction of a railway in front of a lot in block 20 in the town of San Buenaventura. In defense of this action the defendant showed that it had constructed its railroad in front of a lot belonging to plaintiff, in lot 19; that plaintiff had sued for and recovered damages suffered to the latter lot; and the claim was made that all the damages suffered by the plaintiff from the location of the road constituted a single indivisible cause of action. The court sustained this defense, saying: "We think there was no error in the rulings or instructions of the court in this behalf, so far as relates to any damage accruing to either of plaintiff's lots prior to and up to the time of filing his complaint or making his settlement in the former action. The elements of his damage up to that time may have been multifarious, but the cause of it was a unit, — the construction and operation of a single railroad which was complete at the time. The fact that it damaged two lots belonging to the same man, at the same time and by the same means, no more created two causes of action than if two horses belonging to the same man had been killed by a single collision with a locomotive, and this has been held to constitute but a single cause of action: Brannenburg *v.* Indianapolis etc. R. R. Co., 13 Ind. 103; 74 Am. Dec. 250. In cases of tort, the question as to the number of causes of action which the same person may have turns upon the number of the torts, not upon the number of different pieces of property which

The chief justice, however, dissented. He contended that there could not have been any recovery for this damage in the first action, because it had not then arisen; and that the law ought not to be so construed as to require juries upon the trial of actions to estimate prospective damages. The injustice of such a requirement is self-evident. No case can arise involving claims for serious injuries to the person in which the assessment of damage, as the law now stands, can be otherwise than imperfect and unfair. In the majority of cases, defendants must pay for damages which never develop; while in the minority, the most serious injuries must be borne without compensation. A recovery in an action for false imprisonment, brought during the imprisonment, does not merge any claim for damages for the continuance of the same imprisonment.[1] In an action for malicious prosecution the plaintiff may, in addition to the damages occasioned by the unlawful arrest and detention, recover for injury to his reputation by reason of the false accusation. Therefore a judgment for false imprisonment is a bar to an action of slander for the same accusation on which the imprisonment was procured.[2] But such a judgment is no bar, if the utterances complained of, though of the same character and purport, were made at a different time from the accusation by means of which the false imprisonment was occasioned.[3]

§ 242. **Cases of Nuisance.** — In cases of nuisance, the injury may be of two kinds: 1. The injury produced by the act; and 2. That occasioned by the continuing of the nuisance produced by the act. For, while a trespasser is under no obligation to rebuild or replace what he has torn

may have been injured. Each separate tort gives a separate cause of action, and but a single one: 1 Sutherland on Damages, 183, and cases cited. Whenever by one act a permanent injury is done, the damages are assessed once for all: 3 Sutherland on Damages, 372. This principle is established in Marble *v.* Keyes, 9 Gray, 221, and in very many other cases. There is nothing in the authorities cited by appellant in conflict with this view."

[1] Leland *v.* Marsh, 16 Mass. 389.

[2] Carpenter *v.* Sheldon, 4 N. Y. 579.

[3] Rockwell *v.* Brown, 36 N. Y. 207.

down or destroyed, he who creates a nuisance is under a continuing obligation to abate it.[1] Therefore only the damage done at the date of the writ can be compensated in that suit. If that damage exposes the plaintiff to the expenditure of money, he may recover the full amount which he is liable to expend, whether it has been already paid out or not. The material inquiry in the second action is, whether the damages on which it is based are attributable to the original act, or to the continuing of the state of facts produced by that act. In the latter case a new cause has arisen, and a new action will lie. "There may, of course, be cases where it may be difficult to draw the line, but it is apprehended they will not be numerous. Wherever the nuisance is of such a character that its continuance is necessarily an injury, and where it is of a permanent character, that will continue without change from any cause but human labor, there the damage is an original damage, and may be at once fully compensated, since the injured person has no means in his power to compel the individual doing the wrong to apply the labor necessary to remove the cause of injury, and can only cause it to be done, if at all, by the expenditure of his own means. But where the continuance of such act is not necessarily injurious, and where it is necessarily of a permanent character, but may or may not be injurious, or may or may not be continued, there the injury to be compensated in a suit is only the damage that has happened. Thus the individual who so manages the water he uses for his mills as to wash away the soil of his neighbor is liable at once for all the injury occasioned by its removal, because it is in its nature a permanent injury; but if his works are so constructed that upon the recurrence of a similar freshet the water will probably wash away more of the land, for this there can be no recovery until the damage has actually arisen; because it is yet contingent whether any such damage will ever arise. If

[1] Clegg *v.* Dearden, 12 Q. B. 576.

a person erects a dam upon his own land, which throws back the water upon his neighbor's land, he will be answerable for all damage which he has caused before the date of the writ, and, ordinarily, for no more, because it is as yet contingent and uncertain whether any further damage will be occasioned or not, because such a dam is not, of its own nature and necessarily, injurious to the lands above, since that depends more upon the manner in which the dam is used than upon its form. But if such a dam is in its nature of a permanent character, and from its nature must continue permanently to affect the value of the land flowed, then the entire injury is at once occasioned by the wrongful act, and may be at once recovered in damages."[1] Thus where, in building a canal, a river is dammed as a feeder to the canal, and the lands of an adjacent owner are permanently flooded, he cannot recover each year the damage occasioned by the non-use of the land for that year, but must at one time recover the damages, to wit, the full value of the land. But when a dam is built, or a canal dug, or a structure erected which may or may not do damage of a particular character, then each recurring damage constitutes a new cause of action justifying a new recovery.[2]

When proceedings in the exercise of the right of eminent domain are prosecuted, the parties affected must then recover all damages which are the natural and reasonable results of the improvement contemplated; but if it is afterwards constructed or maintained in an unskillful and negligent manner, an additional recovery may be

[1] Troy *v.* Cheshire R. R. Co., 23 N. H. 83; 55 Am. Dec. 177; St. Louis etc. R. R. Co. *v.* Biggs, 52 Ark. 240; 20 Am. St. Rep. 174; Chicago etc. R. R. Co. *v.* McAuley, 121 Ill. 160; Stadler *v.* Grieben, 61 Wis. 500; Ramsdale *v.* Foote, 55 Wis. 557; Miller *v.* Keokuk R. R. Co., 63 Iowa, 680.

[2] St. Louis etc. R. R. Co. *v.* Biggs, 52 Ark. 240; 20 Am. St. Rep. 174; Sullens *v.* Chicago etc. R. R. Co., 74 Iowa, 659; 7 Am. St. Rep. 501; Harbach *v.* Des Moines etc. R. R. Co., 80 Iowa, 593; Athens Mfg. Co. *v.* Rucker, 80 Ga. 291; Valley R. R. Co. *v.* Franz, 43 Ohio St. 623; Reid *v.* City of Atlanta, 73 Ga. 523; Colrick *v.* Swinbourne, 105 N. Y. 503; Werges *v.* St. Louis etc. R. R. Co., 35 La. Ann. 641; Omaha etc. R. R. Co. *v.* Standen, 22 Neb. 343; Stodgill *v.* C., B., & Q. R. R. Co., 53 Iowa, 341.

had for resulting damages.[1] A railroad must be regarded as permanent in its nature, and not as intended to affect some temporary purpose, after which it is to be discontinued. The damage occasioned, therefore, to a roadway and bridge by the construction of a railroad track over them must be estimated for a permanent appropriation. Parties affected by such appropriation are entitled to recover at once their full damages, and if they recover any part, they cannot further recover in a subsequent action.[2] The cases in which different recoveries have been sustained for the results of the same permanent nuisance have chiefly been where water, as the result of unusual freshets, has done damage, and it was not possible to know, when the nuisance was erected, whether it would do the damage afterwards resulting from it, or if so, when or how frequently. Generally, when a nuisance of a permanent character is erected, all the damages which its continuance in the same form will produce must be compensated in one action.[3] Thus if a ditch is dug, a street graded, or an embankment built, whereby plaintiff's lands will necessarily be flooded or washed away, or the waters of a stream to which he is entitled necessarily diverted, all his damages must be embraced in one judgment.[4] So for the deterioration in value of plaintiff's premises by the erection and maintenance of gas-works, he can have but one action.[5]

§ 243. **Separate Torts and Contracts.** — But separate torts give rise to separate causes of action, and each cause remains unaffected by a judgment for any other tort sub-

[1] Denver C. I. & W. Co. *v.* Middaugh, 12 Col. 434; 13 Am. St. Rep. 234; Chicago etc. R. R. Co. *v.* Schaffer, 124 Ill. 112.

[2] Town of Troy *v.* Cheshire R. R. Co., 23 N. H. 83; 55 Am. Dec. 177; Chicago etc. R. R. Co. *v.* McAuley, 121 Ill. 160; Chicago etc. R. R. Co. *v.* Loeb, 118 Ill. 203; 59 Am. Rep. 341.

[3] Chicago etc. R. R. Co. *v.* Schaffer, 124 Ill. 112.

[4] Powers *v.* Council Bluffs, 45 Iowa, 652; 24 Am. Rep. 792; Stodgill *v.* Chicago etc. R. R. Co., 53 Iowa, 461; North Vernon *v.* Voegler, 103 Ind. 314; Bizer *v.* Ottumwa H. Co., 70 Iowa, 145; Haisch *v.* Keokuk R. R. Co., 71 Iowa, 606; St. Louis etc. R. R. Co. *v.* Morris, 35 Ark. 622.

[5] Decatur G. L. & C. Co. *v.* Howell, 92 Ill. 19.

sequent or antecedent. One against whom or against whose property distinct and separate tortious acts have been committed has a cause of action for each; and a recovery for one does not bar a recovery for another, whether committed before or after the commencement of the action in which the recovery was had.[1] Thus a sailor who has maintained an action in a court of admiralty for an assault and battery committed on the high seas is not thereby precluded from obtaining in a common-law court a judgment for an assault and imprisonment on shore during the same voyage.[2] But where A took a bond, conditioned that B should abstain from injuring certain property, a recovery under the bond was held to estop A from obtaining compensation for any injury committed after taking the bond, and before the commencement of the first suit; that while A could have separately recovered for each distinct injury, independent of the bond, yet having elected to proceed under the bond, he was bound by that election, and could neither sustain another action upon the bond, nor disregard it by proceeding upon the tort alone.[3] But if one is liable to another on several distinct contracts, express or implied, he may maintain an action upon each;[4] and for each breach of the same contract may have a separate recovery,[5] except that if he waits until two or more breaches have occurred, he must unite all upon which he then has a right of recovery.

§ 244. **Exceptions to General Law of Merger.** — The law of merger as applied to judgments does not forbid all inquiry into the nature of the cause of action. Such

[1] Williams *v.* Hay, 120 Pa. St. 485; 6 Am. St. Rep. 719; Pishaway *v.* Runnels, 71 Tex. 352; De la Guerra *v.* Newhall, 55 Cal. 21; White *v.* Moseley, 8 Pick. 356; Lenoir's Adm'r *v.* Wilson, 36 Ala. 600.

[2] Adams *v.* Haffards, 20 Pick. 127.

[3] Goodrich *v.* Yale, 97 Mass. 15.

[4] Stark *v.* Stark, 94 U. S. 477; Phillips *v.* Berick, 16 Johns. 136; 8 Am. Dec. 299; Flaherty *v.* Taylor, 35 Mo. 447; Eastman *v.* Porter, 14 Wis. 39; Bliss *v.* Weil, 14 Wis. 35; 80 Am. Dec. 766; White *v.* Smith, 33 Pa. St. 186; 75 Am. Dec. 589; Kronshage *v.* Chicago etc. R. R. Co., 45 Wis. 500; *ante*, sec. 238.

[5] McEvoy *v.* Bock, 37 Minn. 402; Insurance Co. *v.* Alges, 31 Pa. St. 446; Andrew *v.* Schmidt, 64 Wis. 664; Givens *v.* Peake, 1 Dana, 225; *ante*, sec. 240.

inquiry may be prosecuted for any purpose consistent with the judgment; and is frequently necessary to its interpretation. The place where a contract was made may be ascertained, in order that the *lex loci*, which was a part of the contract, may have its effect upon the judgment. If the prevailing party was entitled to certain privileges or exempted from certain burdens under his contract, he may be entitled to the same privileges and exemptions, in many cases, under his judgment. And whenever justice requires it, judgments will generally be construed, not as a new debt, but as an old debt in a new form.[1]

§ 245. **Doctrine of Merger Modified in Proceedings in Bankruptcy.** — In no class of cases has the technical operation of the doctrine of merger been so frequently limited as in those where the effect of a discharge of a debtor under laws for the relief of insolvents had to be determined. In many cases, judgments entered subsequently to the filing of the debtor's petition have been deemed to be beyond the scope of his discharge,[2] while in a still greater number of cases it has been held that whenever a cause of action, existing at the time of the filing of the debtor's petition, was of such a nature that the discharge would have affected it, any judgment recovered thereon prior to the decree of discharge will be affected to an equal extent; and that within the meaning of those laws such judgments are never to be regarded as new debts arising subsequently to the filing of the petition.[3]

[1] Evans *v.* Sprigg, 2 Md. 457; Wyman *v.* Mitchell, 1 Cow. 316; Clark *v.* Bowling, 3 N. Y. 216.

[2] Bradford *v.* Rice, 102 Mass. 472; 3 Am. Rep. 483; Ellis *v.* Ham, 28 Me. 385; Kellogg *v.* Schuyler, 2 Denio, 73; Uran *v.* Houdlette, 36 Me. 15; Roden *v.* Jaco, 17 Ala. 344; Pike *v.* McDonald, 32 Me. 418; 54 Am. Dec. 597; Woodbury *v.* Perkins, 5 Cush. 86; 51 Am. Dec. 51; Cutter *v.* Evans, 115 Mass. 27; McCarthy *v.* Goodwin, 8 Mo. App. 380.

[3] Blanford *v.* Foote, 1 Cowp. 138; Imlay *v.* Carpenter, 14 Cal. 173; Johnson *v.* Fitzhugh, 3 Barb. Ch. 360; Clark *v.* Rowling, 3 N. Y. 216; 53 Am. Dec. 290; Rogers *v.* Ins. Co., 1 La. Ann. 161; Dick *v.* Powell, 2 Swan, 632; Stratton *v.* Perry, 2 Tenn. Ch. 633; Harrington *v.* McNaughton, 20 Vt. 293; McDonald *v.* Ingraham, 30 Miss. 389; 64 Am. Dec. 166; Betts *v.* Bagley, 12 Pick. 572; Raymond *v.* Merchant, 3 Cow. 147; Fox *v.* Woodbury, 9 Barb. 498; Dresser *v.* Brooks, 3 Barb. 429; Anderson *v.* Anderson, 65 Ga. 518; 38 Am. Rep. 797; Dawson *v.* Hartsfield, 79 N. C. 334; Stockwell *v.* Woodward, 52 Vt. 234; Dinsdale *v.* Eames, 4 Moore, 350; 2 Brod. & B. 8.

If a statute authorizing the granting of discharges in bankruptcy or insolvency excepts from its operation debts of a particular character, and those debts have merged into judgments, the question arises whether they have become new obligations, so as to be brought within the operation of the discharge. The opinion generally prevailing upon this subject is, that the judgment retains the character of the indebtedness out of which it arose, and is not discharged unless that indebtedness would have been discharged had no judgment been recovered thereon.[1] Whether a contract made in another state and reduced to judgment in this loses its rights to protection against insolvency laws is a difficult question to answer. In one case it was held not liable to be discharged by insolvency laws of the state where the original indebtedness arose,[2] while in another case it was held to be affected by such discharge if both parties still resided in the state wherein it was granted.[3] If, however, a creditor who is a citizen of another state sues in this and recovers judgment here, we think he does not thereby submit either himself or his indebtedness to the jurisdiction of this state to the extent that it can discharge his indebtedness under its insolvency laws, and that if it is beyond the power of this state to grant a discharge in insolvency operative against the original debt, it is equally beyond its power to grant a discharge against a judgment recovered thereon in this state by one who continues to be a citizen of another state.[4]

[1] Donald *v.* Kell, 111 Ind. 1; Horner *v.* Spellman, 78 Ill. 206; Wade *v.* Clark, 52 Iowa, 158; 35 Am. Rep. 262; Howland *v.* Carson, 28 Ohio St. 625; Carit *v.* Williams, 74 Cal. 183; Matter of Patterson, 2 Ben. 156; Simpson *v.* Simpson, 80 N. C. 332. *Contra,* Wolcott *v.* Hodge, 15 Gray, 547; 77 Am. Dec. 381; Bradford *v.* Rice, 102 Mass. 472; 3 Am. Rep. 483.

[2] Green *v.* Sarmiento, 3 Wash. 17.

[3] Betts *v.* Bagley, 12 Pick. 580.

[4] Murphy *v.* Manning, 134 Mass. 488.

# CHAPTER XII.

## THE JUDGMENT AS AN ESTOPPEL.

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## PART I. — NATURE AND EXTENT OF JUDGMENT ESTOPPELS.

§ 246. **Definition of Estoppel.** — Having treated of the parties whose relation to an adjudication is such as to bind them by the facts which it necessarily affirms to the same extent that the immediate parties to the record are bound, we come now to the consideration of the question, What facts does a judgment or decree so establish that neither the parties nor their privies can ever afterward gainsay them? But before undertaking to consider or to answer the question, we may, without wandering far from our subject, show that the word "estoppel," in the

sense in which it is defined by Lord Coke, is a term not proper for the designation of that conclusiveness which confessedly attends every final determination of the rights of the parties to any action or proceeding. According to that definition, an estoppel is "where a man is not permitted to speak the truth." Whatever is settled by a judgment is the result of an investigation conducted under the most favorable rules that mankind have been able to devise for the exposure of falsehood and the ascertainment of truth. Unless the law is much less "than the perfection of human wisdom," this result can rarely be inconsistent with truth. In the common as in the civil law, "the authority of *res judicata* induces a presumption that everything contained in the judgment is true, and this presumption, being *juris et de jure*, excludes every proof to the contrary."[1] The term "estoppel," as applied to judgments, should therefore be defined as that which prohibits a party from disputing the truth.

§ 247. **Not Odious.**—The word "estoppel," as associated with judgments, has ceased to be odious. It is more than freed from opprobrious appellations; the vocabulary of the judges has been wellnigh exhausted to supply it with honorable and endearing titles. This will be made evident by quotations from a few American and a few English cases: "The doctrine of estoppel by a former judgment between the same parties is one of the most beneficial principles of our jurisprudence, and has been less affected by legislation than almost any other."[2] "The maxim that there must be an end to litigation was dictated by wisdom and is sanctified by age."[3] That an estoppel is odious is not to be applied to former adjudications. The prevention of relitigation, after years have elapsed, does not necessarily shut out the truth.

[1] 1 Pothier on Obligations, pt. 4, c. 3, sec. 3, art. 3.

[2] Miller, J., in Aurora City *v.* West, 7 Wall. 82.

[3] Carothers, J., in Warwick *v.* Underwood, 3 Head, 238; 75 Am. Dec. 767.

The doctrine of estoppels in judgments, instead of being odious, is one of the most conservative and salutary doctrines of the law.[1] "It has been affirmed that there is no such thing as an equitable estoppel. But the doctrine of election, which prevents a party from claiming in repugnant rights, and which has been advantageously introduced into courts of equity, is manifestly an extension of this principle. In courts of law they are for the most part reconcilable to the purest morality; and when they produce neither hardship nor injustice, they merit indulgence, if not favor. The conclusiveness of judgments, which conduces so essentially to peace and repose, has no other foundation."[2] "The very object of instituting courts of justice is, that litigation should be decided, and decided finally. That has been felt by all jurists. It is long since a reason has been assigned why judgments should be considered final, and should not be ripped up again, — *Ne lites sent immortales, dum litantes sunt mortales.* Human life is not long enough to allow of matters once disposed of being brought under discussion again; and for this reason it has always been considered a fundamental rule that when a matter has once become *res judicata*, there shall be an end to the question."[3] The doctrine of estoppel is not strictly applicable to a judgment. A judgment is not the act of a party; an estoppel is. A judgment is a bar, not because a party has done some act which precludes him from asserting a right or title; it is properly a bar on principles of public policy, because the peace and order of society, the structure of our judicial system, and the principles of our government require that a matter once litigated should not again be drawn in question between the same parties or their privies.[4] A party whose interests are placed in jeopardy

[1] Gray *v.* Pingry, 17 Vt. 419; 44 Am. Dec. 345.

[2] Gibson, J., in Martin *v.* Ives, 17 Serg. & R. 364–366. See also Nelson, J., in Van Rensselaer *v.* Kearney, 11 How. 326.

[3] Willes, J., in Great Northern R. R. Co. *v.* Mossop, 17 Com. B. 140.

[4] Huston, J., in Kilheffer *v.* Kerr, 17 Serg. & R. 349; 17 Am. Dec. 658; Kennedy, J., in Marsh *v.* Pier, 4 Rawle, 273; 26 Am. Dec. 131.

by a trial has a right to judicial immunity from the consequences of further trials involving the same issues. If a claim is in issue, and is not withdrawn at the trial, it should be disposed of by the judgment; and if the court, under such circumstances, reserves *such claim* by reciting in the judgment that "no judgment is hereby rendered touching the same," this action, it is said, will be reversed on appeal by making the judgment a *final* bar to the further prosecution of the claim.[1]

§ 248. **Decrees — Estoppels in Equity.** — A final decree in chancery is as conclusive as a judgment at law.[2] Such decrees are available as estoppels, whether the second action involving the same question be at law or in equity.[3] Hence a decree dismissing a bill for foreclosure on the ground that the mortgage was void is a complete defense to an action of ejectment subsequently brought by the mortgagor. "A verdict and judgment of a court of record or a decree in chancery puts an end to all points thus decided between the parties to the suit. In this there is, and ought to be, no difference between a verdict and judgment in a court of law and a decree in a court of equity. They both stand on the same footing, and may be offered in evidence under the same limitations; and it would be difficult to assign a reason why it should be otherwise."[4] A judgment at law is conclusive on the same question in equity.[5] "Nor is there anything anoma-

[1] Schmidt *v.* Zahensdorf, 30 Iowa, 498.

[2] Sibbald's Case, 12 Pet. 492; Evans *v.* Tatem, 9 Serg. & R. 261; 11 Am. Dec. 717; Kelsey *v.* Murphy, 26 Pa. St. 78; White *v.* Bank of U. S., 6 Ohio, 529; Bank of U. S. *v.* Beverley, 1 How. 148; Low *v.* Mussey, 41 Vt. 393; Maguire *v.* Tyler, 40 Mo. 406; McDonald *v.* Mobile L. I. Co., 65 Ala. 358; Denver *v.* Lobenstein, 3 Col. 316.

[3] Stark *v.* Woodward, 1 Nott & McC. 328; Hook *v.* Hood, 2 How. (Miss.) 867; Moody *v.* Harper, 38 Miss. 599; Western M. & M. Co. *v.* V. C. C. Co., 10 W. Va. 250; Baldwin *v.* McRea, 38 Ga. 650; Williams *v.* Row, 62 Pa. St. 118; Westcott *v.* Adams, 68 Pa. St. 34; Powers *v.* Chelsea S. B., 129 Mass. 44; Thompson *v.* Lester, 75 Tex. 521; Shenandoah V. R. R. *v.* Griffith, 76 Va. 913; Stevens *v.* Du Berry, 1 Mackey, 294.

[4] Smith *v.* Kernochen, 7 How. 198; Hopkins *v.* Lee, 6 Wheat. 109; Marsh *v.* Burroughs, 19 Am. Law Rep. 718; Wilson *v.* Boughton, 50 Mo. 17; The Phœbe Stuart, L. C. Adm. Rep. 63.

[5] Pearce *v.* Gray, 2 Younge & C. Ch. 322; Hendrickson *v.* Norcross, 19 N. J. Eq. 417; Spellman *v.* Bowen, 8 Gill & J. 50; 29 Am. Dec. 524; Pollock *v.*

lous or unusual in setting up a former adjudication as an estoppel to an action for equitable relief. There is nothing unjust or inequitable in insisting upon an estoppel by a judgment upon the same point; on the contrary, the rule is a beneficial one, and it is a matter in which the public is said to have an interest as well as the parties, that there should be an end to litigation."[1] It will be seen from the authorities just cited and quoted that the law of estoppel arising from a former adjudication is equally applicable, whether the second action or proceeding or the former litigation be of a legal or of an equitable nature. And this adoption of the law of estoppel as a part of the principles of equity jurisprudence shows that it is by common consent deemed consistent with and necessary to a disposition of the rights of the parties, according to equity and good conscience. The fact that a party was, in a suit in equity, not permitted to be a witness on his own behalf will not prevent the decree entered therein from being conclusive against him in a subsequent action at law, though in such action he is competent to appear as a witness for himself.[2]

§ 249. **Extent of the Estoppel.** — There is no doubt that a judgment or decree necessarily affirming the existence of any fact is conclusive upon the parties or their privies, whenever the existence of that fact is again in issue between them,[3] not only when the subject-matter is the same,

Gilbert, 16 Ga. 398; 60 Am. Dec. 732; Bonney *v.* Bowman, 63 Miss. 166; Cowan *v.* Wheeler, 25 Me. 267; 43 Am. Dec. 283; McCampbell *v.* McCampbell, 5 Litt. 92; 15 Am. Dec. 48; Lane *v.* Lane, 80 Me. 270; Tilson *v.* Davis, 32 Gratt. 92.

[1] San Francisco *v.* S. V. W. W., 39 Cal. 473.

[2] Putnam *v.* Clark, 34 N. J. Eq. 532.

[3] Duchess of Kingston's Case, 11 State Trials, 261; Gahan *v.* Maingay, 1 Irish Term Rep. 54; Croudson *v.* Leonard, 4 Cranch, 436; Outram *v.* Morewood, 3 East, 345; Gardner *v.* Buckbee, 3 Cow. 120; 15 Am. Dec. 256; Peay *v.* Duncan, 20 Ark. 85; Hibshman *v.* Dulleban, 4 Watts, 183; Gist *v.* Davis, 2 Hill Ch. 335; 29 Am. Dec. 89; Lare *v.* Truman, 10 Ohio St. 45; Wales *v.* Lyon, 2 Mich. 276; Mayor *v.* Lord, 9 Wall. 409; Sabin *v.* Sherman, 28 Kan. 289; Heroman *v.* Louisiana D. & D. I., 34 La. Ann. 805; Hudson *v.* Superior Judge, 42 Mich. 239; Williams *v.* Bachelor, 90 N. C. 364; Springs *v.* Schenck, 106 N. C. 153; Kellogg *v.* Maddocks, 1 Wash. 407; Bleckeley *v.* Branyan, 28 S. C. 445; Smith *v.* Sims, 77 Mo. 269; Lieb *v.* Lichtenstein, 121 Ind. 483; Morse *v.* Elms, 131 Mass. 151; Parnell *v.* Hahn, 61 Cal. 131; Allis *v.* Davidson, 23 Minn. 442.

but when the point comes incidentally in question in relation to a different matter,[1] in the same or any other court, except on appeal, writ of error, or other proceeding provided for its revision.[2]

The judgments of appellate courts are as conclusive as those of any other court. They not only establish facts, but also settle the law, so that the law as decided upon any appeal must be applied in all the subsequent stages of the cause.[3] Nor can the effect of a judgment as *res judicata* be avoided by showing that though an appeal was attempted to be taken the judgment was affirmed without considering the cause on its merits, because of the absence of a sufficient assignment of errors, or of some other defect in the appellate proceedings.[4]

"It is a universal principle that where power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject-matter; and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power conferred. The only questions which can arise between an individual claiming a right under acts done, and the public or any person denying its validity, are, power in the officer and fraud in the party. All other questions are settled by the decision made or act done by the tribunal or officer, whether executive, legislative, judicial, or special, unless an appeal is taken."[5] After judgment on the merits, the parties "cannot canvass the same question again in another action, although, perhaps, some objection or argument might have been urged upon the first trial which would have led to a different judgment."[6]

[1] Gray *v.* Dougherty, 25 Cal. 272; Caperton *v.* Schmidt, 26 Cal. 493; 85 Am. Dec. 187; Garwood *v.* Garwood, 29 Cal. 521.

[2] Demeritt *v.* Lyford, 7 Fost. 541.

[3] Chouteau *v.* Gibson, 76 Mo. 38; Lucas *v.* San Francisco, 28 Cal. 591; Sturgis *v.* Rogers, 26 Ind. 1.

[4] Miller *v.* Bernicker, 46 Mo. 194.

[5] United States *v.* Arredondo, 6 Pet. 729; Waugh *v.* Chauncey, 13 Cal. 12.

[6] Greathead *v.* Bromley, 7 Term Rep. 456.

"An adjudication is final and conclusive not only as to the matter actually determined, but as to every other matter which the parties might have litigated and have had decided as incident to or essentially connected with the subject-matter of the litigation, and every matter coming within the legitimate purview of the original action, both in respect to matters of claim and of defense."[1] The general expression, often found in the reports, that a judgment is conclusive of every matter which the parties might have litigated in the action is misleading. What is really meant by this expression is, that a judgment is conclusive upon the issues tendered by the plaintiff's complaint. It may be that the plaintiff might have united other causes of action with that set out in his complaint, or that the defendant might have interposed counterclaims, cross-bills, and equitable defenses, or either of the parties may have acquired new rights pending the litigation, which might, by permission of the court, have been pleaded by supplemental complaint or answer, and therefore might have been litigated in the action. But as long as these several matters are not tendered as issues in the action, they are not affected by it. Whatever material allegations the plaintiff makes in his pleadings he must maintain, if they are controverted, and failing to do so, a judgment against him is conclusive of their falsity. The defendant, on his part, must controvert all these allegations which he wishes to gainsay, and failing to do so, their truth is incontestably established as against him.

[1] Harris *v.* Harris, 36 Barb. 88; Clemens *v.* Clemens, 37 N. Y. 59; Burford *v.* Kersey, 48 Miss. 643; Bates *v.* Spooner, 45 Ind. 489; Estill *v.* Taul, 2 Yerg. 466; 24 Am. Dec. 498; Petersine *v.* Thomas, 28 Ohio St. 596; Tuska *v.* O'Brien, 68 N. Y. 446; Cromwell *v.* County of Sac, 94 U. S. 351; Case *v.* Beauregard, 101 U. S. 688; Thompson *v.* Myrick, 24 Minn. 4; Jacobson *v.* Miller, 41 Mich. 90; Roby *v.* Rainsberger, 27 Ohio St. 674; Knight *v.* Atkinsson, 2 Tenn. Ch. 384. Failure to plead matters of defense which might have been pleaded is a waiver of them forever: Dewey *v.* Peck, 33 Iowa, 242; Lawrence S. B. *v.* Stevens, 46 Iowa, 429; Murrell *v.* Smith, 51 Ala. 301; Kelly *v.* Donlin, 70 Ill. 378; Gaines *v.* Kennedy, 53 Miss. 103; Covington & C. B. Co. *v.* Sargent, 27 Ohio St. 233. But to come within this rule, the matter claimed to be barred must be such that the party was bound to present it: Malloney *v.* Horan, 49 N. Y. 115; 10 Am. Rep. 335; Barwell *v.* Knight, 51 Barb. 267.

He cannot by failing to deny any of them, or if he denies them, by failing to offer evidence to controvert that offered by plaintiff in support of any of them, successfully claim that it has not been litigated and determined against him. In other words, neither party can decline to meet an issue tendered by the other, and then maintain that it has not become *res judicata*. The plaintiff must support all the issues necessary to maintain his cause of action. The defendant must bring forward all the defenses which he has to the cause of action asserted in the plaintiff's pleadings[1] at the time they were filed. In this sense is it true that a judgment is conclusive of every matter which might have been litigated and decided in the action. But the plaintiff is under no obligation to tender issues not necessary to support his cause of action, nor is the defendant required to meet issues not tendered by plaintiff; and if, after the defendant has fully met all the issues tendered by plaintiff, there is any matter not admissible in evidence under the pleadings, it is generally not concluded by the judgment, though the parties might by different pleadings have made it an issue in the action and had it determined. Thus in an action to recover real estate, the defendant cannot put in evidence a title acquired *pendente lite*, unless he has pleaded it by a supplemental answer;[2] and therefore where he has not so pleaded it, he is not concluded from asserting it in a subsequent action.[3] In one case it

[1] Glenn *v.* Savage, 14 Or. 567; Nichols *v.* Dibrell, 61 Tex. 539; Caston *v.* Perry, 1 Bail. 533; 21 Am. Dec. 482; Neil *v.* Tolman, 12 Or. 289; Mally *v.* Mally, 52 Iowa, 654; Ludeling *v.* Chaffe, 40 La. Ann. 645; Gage *v.* Downey, 79 Cal. 140; Woodhouse *v.* Duncan, 106 N. Y. 527; Bierer *v.* Fritz, 37 Kan. 27; Lee *v.* Kingsbury, 13 Tex. 68; 62 Am. Dec. 546; Ellis *v.* Clarke, 19 Ark. 420; 70 Am. Dec. 603; Wilson *v.* Stripe, 4 G. Greene, 551; 61 Am. Dec. 138; Kenyon *v.* Wilson, 78 Iowa, 408; Embury *v.* Conner, 3 N. Y. 511; 53 Am. Dec. 527; Denver C. I. & W. Co. *v.* Middaugh, 12 Col. 434; 13 Am. St. Rep. 234; Sayre *v.* Harpold, 33 W. Va. 553; Howe *v.* Lewis, 121 Ind. 110; State *v.* Brown, 64 Md. 199. Faust *v.* Faust, 31 S. C. 576; Sloan *v.* Price, 84 Ga. 171; 20 Am. St. Rep. 354; Stickney *v.* Goudy, 132 Ill. 213; Berry *v.* Whiddin, 62 N. H. 473; Warren *v.* Cook, 116 Ill. 199; Sauls *v.* Freeman, 24 Fla. 209; 12 Am. St. Rep. 190; Bennitt *v.* Wilmington S. M. Co., 119 Ill. 9; Elwood *v.* Beymer, 100 Ind. 504; Jarboe *v.* Severin, 112 Ind. 572; Kurtz *v.* Carr, 105 Ind. 574.

[2] Bagley *v.* Ward, 37 Cal. 121; 99 Am. Dec. 256; Valentine *v.* Mahoney, 37 Cal. 396; Thompson *v.* McKay, 41 Cal. 221.

[3] People's Sav. B. *v.* Hodgdon, 64 Cal. 95.

was decided that the fact that a question could have been determined in a former controversy was sufficient to make it *res judicata* as to the property there involved, but did not settle it as to other property, unless it was actually litigated.[1]

"Where the matter adjudicated is by a court of peculiar and exclusive jurisdiction, and the same matter comes incidentally in question before another court, the sentence in the former is conclusive upon the latter, as to the matter directly decided, not only between the same parties, but against strangers, unless it can be impeached on the ground of fraud or collusion."[2] The discovery of new evidence, not in the power of the party at the former trial, forms no exception to the rule in relation to estoppels, whether the second action is at law or in equity.[3] If a judgment of reversal provides that it is not to prejudice any future claim which the appellee may make on further proof, this judgment is nevertheless conclusive in a second action, unless the proof is different from that in the first action.[4] To render a matter *res judicata*, it is not essential that it should have been distinctly and specifically put in issue by the pleadings. It is sufficient that it be shown to have been tried and settled in the former suit.[5] When a matter is once adjudicated, it is conclusively determined as between the same parties and their privies; and this determination is binding as an estoppel, in all other actions, whether commenced before or after the action in which the adjudication was made.[6] The effect of a judgment as *res judicata* is not limited nor enlarged by the reasons given by the court for its rendition,[7]

[1] Sloan *v.* Price, 84 Ga. 171; 20 Am. St. Rep. 354.

[2] Lessee of Rhoades *v.* Selin, 4 Wash. C. C. 716.

[3] Kilheffer *v.* Kerr, 17 Serg. & R. 319; 17 Am. Dec. 658.

[4] Innis *v.* Roane, 4 Call, 379.

[5] Bigelow *v.* Winsor, 1 Gray, 299.

[6] Poorman *v.* Mitchell, 48 Mo. 45; Allis *v.* Davidson, 23 Minn. 442; Finley *v.* Hanbest, 30 Pa. St. 190; Marble *v.* Keyes, 9 Gray, 221; Memphis & C. R. R. Co. *v.* Grayson, 88 Ala. 572; 16 Am. St. Rep. 69; Schuler *v.* Israel, 120 U. S. 506; Casebeer *v.* Mowry, 55 Pa. St. 419; 93 Am. Dec. 766. *Contra*, State *v.* Spikes, 33 Ark. 801.

[7] Davis *v.* Millaudin, 17 La. Ann. 15; 87 Am. Dec. 517; Garvin *v.* Garvin, 27 S. C. 472; Girardin *v.* Dean, 49 Tex. 243.

nor by the failure of the court to give its reasons in writing on every point when required to do so by the constitution of the state.[1] Neither can the force of a judgment as *res judicata* be destroyed or impaired by showing that it was clearly erroneous, and ought not to have been rendered, whether such error resulted from the court drawing an erroneous conclusion from conceded or established facts,[2] or making a ruling during the progress of the trial whereby evidence was erroneously admitted or excluded, or the law misstated to the jury, or one of the parties was otherwise deprived of the benefit of his cause of action or defense, or of some part thereof.[3] Nor is the effect of a judgment as *res judicata* lessened when the fact that it is erroneous is established by the decision of the highest appellate tribunal in the state, rendered in another action.[4]

The law of the case seems not only to govern the action in its subsequent stages, but to control other actions between the same parties relating to the same subject-matter or transaction. Thus where several installments of money were due on a contract, and the court decided that it was such a contract that an action could be sustained for one installment without impairing the right to subsequently sue for another installment due when the first action was brought, it was held that the parties were estopped in a third action from contending that the decision in the prior action was erroneous, and that a judgment for any one installment merged others due when the action was brought.[5] So where the character and effect of a writing is settled by the judgment of a court of competent jurisdiction, it cannot be shown in another action between the

[1] Henry *v.* Davis, 13 W. Va. 230.

[2] Case *v.* Beauregard, 101 U. S. 688; State *v.* Ramsburg, 43 Md. 325; Rountree *v.* Walker, 46 Tex. 300; Linehan *v.* Hathaway, 54 Cal. 251; Crenshaw *v.* Julian, 26 S. C. 283; 4 Am. St. Rep. 719; Darke *v.* Ireland, 4 Utah, 192; Leavenworth *v.* Chicago etc. R. R. Co., 134 U. S. 688; Howison *v.* Weeden, 77 Va. 704; Peck *v.* Culberson, 104 N. C. 425; Scotland County *v.* Hill, 132 U. S. 107; State *v.* Bowen, 45 Minn. 145.

[3] Winslow *v.* Stokes, 3 Jones, 285; 67 Am. Dec. 242; Sayré *v.* Harpold, 33 W. Va. 553.

[4] Stevenson *v.* Edwards, 98 Mo. 622; Frost *v.* Frost, 21 S. C. 501.

[5] Lorillard *v.* Clyde, 122 N. Y. 41; 19 Am. St. Rep. 470; and case with same title in 102 N. Y. 59.

same parties that it ought to be given a different effect,[1] and a judgment in favor of defendants in a suit against county commissioners to enjoin an assessment for road improvements, on the ground of their want of jurisdiction to make it, is a bar to a subsequent suit claiming their want of jurisdiction, upon a ground not before urged.[2]

In proceedings in the court of claims the law of *res judicata* applies against the government as if it were an ordinary suitor.[3] The fact that the amount in controversy is so small that the defeated party has no right of appeal does not make the judgment any the less conclusive when the same question arises in a subsequent litigation, though the amount there involved is sufficiently large to support an appeal.[4] If a decree or order is entered authorizing the sale of land or other property, it is conclusive of all matters which might have been urged against granting it, and the court will not consider any of such matters as grounds for denying the confirmation of a sale made pursuant to such order or decree;[5] and the order of confirmation, unless vacated by the court which entered it, is conclusive upon all facts necessary to support the sale, if the court had jurisdiction of the cause and of the parties, and authority to order the sale.[6] A judgment refusing a writ of mandate or other prerogative writ is effective as a bar to any further litigation based upon the same right of recovery.[7] On the other hand, on an application for a writ of mandate to compel the levy of a tax to pay a judgment, it has been held that, if it appears that the judgment was recovered upon certain bonds or coupons which

[1] Thorn *v.* Newsom, 64 Tex. 161; 53 Am. Rep. 747.

[2] Martin *v.* Roney, 41 Ohio St. 141.

[3] Fendall *v.* United States, 14 Ct. of Cl. 247.

[4] Griffin *v.* Long Island R. R. Co., 102 N. Y. 449.

[5] Hale *v.* Manchester etc. R. R. Co., 61 N. H. 641; Freeman on Executions, sec. 304 f; Koehler *v.* Ball, 2 Kan. 154; 83 Am. Dec. 451; Musgrove *v.* Lusk, 2 Tenn. Ch. 579; Norris *v.* Callahan, 19 W. Va. 159.

[6] Freeman on Executions, sec. 304 l; Burling *v.* Melhorn, 75 Va. 639; Langyher *v.* Patterson, 77 Va. 470; Brown *v.* Gilmore, 8 Md. 332; Neligh *v.* Keene, 16 Neb. 407; Wyant *v.* Tuthill, 17 Neb. 495; McGavock *v.* Bell, 3 Cold. 512; Dresbach *v.* Stein, 41 Ohio St. 70; Sewell *v.* Watson, 21 La. Ann. 589; State N. B. *v.* Neel, 53 Ark. 110; 22 Am. St. Rep. 185.

[7] Louis *v.* Brown, 109 U. S. 162; Santa Cruz Gap Turnpike etc. Co. *v.* Santa Cruz Co. Supervisors, 62 Cal. 40.

were void for want of authority to issue them, the writ will be denied on account of their invalidity, notwithstanding the judgment recovered upon them.[1] Precisely what conditions are indispensable to a judgment in one action, in order that it may be received as conclusive in another, has never been specified in any very distinct or satisfactory manner. We shall, however, proceed to show those requisites which have been enumerated by various judges.

PART II. — REQUISITES TO JUDGMENT ESTOPPELS.

§ 250. **Judgment must be Free from Collusion.** — According to the statement made by Wedderburn in his argument in the celebrated case against the Duchess of Kingston, and adopted by Lord Brougham in a subsequent case,[2] to receive credit as an estoppel, a judgment or decree must be "a judicial determination of a cause agitated between real parties, upon which a real interest has been settled. In order to make a sentence, there must be a real interest, a real prosecution, a real defense, and a real decision. Of all these requisites, not one takes place in a fraudulent or collusive suit. There is no judge, but a person invested with the insignia of a judicial office is misemployed in listening to a fictitious cause proposed to him. There is no party litigating; there is no party defendant, no real interest brought in question."[3] It is also said that the principle of *res judicata* cannot be invoked to sustain fraud. Therefore, in an action against several judgment defendants upon a judgment, one of them may show that it was obtained by a conspiracy between the plaintiff and one of the defendants.[4] One cannot, by procuring proceedings to be commenced against himself and controlling both the prosecution and defense, procure a judgment "which will bar another action in

[1] Brownsville *v.* Loague, 129 U. S. 493.

[2] Earl of Bandon *v.* Becher, 3 Clark & F. 479.

[3] Duchess Kingston's Case, 11 State Trials; Batts *v.* Winstead, 77 N. C. 238.

[4] Spencer *v.* Vigneaux, 20 Cal. 442.

favor of a party whose name has been used, but who in fact had no knowledge or control of the prosecution of the action."[1]

§ 251. **Judgment must be Final.** — No question becomes *res adjudicata* until it is settled by a *final judgment.*[2] For this reason, the verdict of a jury, the finding of a court, or the report of a referee or master is not admissible as evidence to create an estoppel, before it has received the sanction of the court, by passing into a judgment.[3] But where no power exists to destroy the effect of a verdict, it is conclusive in the absence of any judgment. Thus where a justice of the peace was, by law, bound to enter a judgment according to the findings of the jury, and had no authority to arrest it nor to award a new trial, it was held that his omission to comply with the law did not prevent the verdict from barring a new suit. "The entry of judgment was a thing of course, and in justice and sound policy the verdict ought to be equally conclusive against any further litigation between the same parties, on the same matter, as if the formal entry of judgment had been made."[4] So in Vermont if a judgment is regularly rendered, and the cause continued for the assessment of damages, the validity of the contract on which the action is founded is regarded as established beyond further controversy.[5] The same reasons which require that a verdict should not, by itself, be regarded as conclusive are equally applicable to such interlocutory judgments or decrees as may at any time be modified or vacated by the court which rendered them.[6] The rule

[1] Ice *v.* State, 123 Ind. 593.

[2] Collins *v.* Jennings, 42 Iowa, 447; Webb *v.* Buckelew, 82 N. Y. 555; State *v.* Jenkins, 70 Md. 472; Banking Ass'n *v.* Adams, 3 Woods, 21.

[3] Smith *v.* McCool, 16 Wall. 560; Benson *v.* Post, 2 Dak. 220; Holbert's Estate, 57 Cal. 257; Nash *v.* Hunt, 116 Mass. 237; Ridgely *v.* Spenser, 2 Binn. 70; Whitaker *v.* Bramson, 2 Paine, 209; McReady *v.* Rogers, 1 Neb. 124; 93 Am. Dec. 333; Humphreys *v.* Browne, 19 La. Ann. 158; Schurmeier *v.* Johnson, 10 Minn. 319; Gilbert *v.* Graham, East. T. 1873, in New Brunswick.

[4] Felter *v.* Mulliner, 2 Johns. 181; Estep *v.* Hutchman, 14 Serg. & R. 181.

[5] New York C. B. *v.* Dorset Marble Co., 58 Vt. 70.

[6] Baugh *v.* Baugh, 4 Bibb, 556.

upon this subject, and the grounds upon which it is based, are well stated by Pothier. He says: "A judgment, to have the authority or even the name of *res judicata*, must be a definitive judgment of condemnation or dismissal. A provisional condemnation, then, cannot have either the name or the authority of *res judicata*, for although it gives the party obtaining it a right to compel the opposite party to pay, or deliver provisionally, the money or things demanded, it does not put an end to the cause, or form a presumption *juris de jure*, that what is ordered to be paid or delivered is due, since the party condemned may be admitted in the principal case to prove that what he was ordered to pay was not due, and consequently to obtain a reversion of the judgment."[1]

§ 252. **Identities Demanded.** — "To make a matter *res adjudicata*, there must be a concurrence, —1. Of identity of the subject-matter; 2. Of the cause of action; 3. Of person and parties; and 4. In the quality of the persons for or against whom the claim is made."[2] According to another case, the requisites are: 1. That the judgment proceed from a court having jurisdiction; 2. That it be between the same parties; and 3. That it be for the same purpose.[3] In Massachusetts, to ascertain whether a judgment is a bar, the courts will inquire, —

1. Whether the subject-matter in controversy has been brought in question, and within the issue in the former proceeding, and has terminated in a regular judgment on the merits;

2. Whether the former suit was between the same parties, in the same right or capacity, or their privies claiming under them;

3. Whether the former judgment was before a court of competent jurisdiction.[4]

[1] Pothier on Obligations, pt. 4, c. 3, sec. 3, art. 1.

[2] Benz *v.* Hines, 3 Kan. 397; 89 Am. Dec. 594; State *v.* Jumel, 30 La. Ann. 861; 2 Bouvier's Law Dic., tit. Res Judicata; Slocomb *v.* De Lizardi, 21 La. Ann. 355; 99 Am. Dec. 740.

[3] Aspden *v.* Nixon, 4 How. 467, 497.

[4] Bigelow *v.* Windsor, 1 Gray, 299. See also McDonogh's Succession, 24

That a judgment, to constitute an estoppel, must proceed from a court of competent jurisdiction is a proposition which requires neither arguments nor authorities to prove its existence or to illustrate its application. The necessity of a judgment being between the same parties or their privies, and the limitation and extensions of the rule in this respect, have already been fully considered in the chapter on parties. But the cases cited seem to demand the existence of the following identities between two suits, to constitute the first decided a bar to the further prosecution of the second, to wit: 1. Identity of subject-matter; 2. Identity of cause of action; and 3. Identity of purpose or object. While a concurrence of these identities usually attends when one case is determined by the decision in another, yet nothing is indispensable to impart a conclusive effect to a former judgment, as will be manifest by reference to a few of the reported cases, except identity of issues or issues involved. If any question of fact has been necessarily and directly drawn in question and determined by a final judgment, such determination of it is generally conclusive in a subsequent action between the same parties and those in privity with them, whether the form or subject-matter of the two actions be the same or different. On the other hand, if two actions are upon different causes, a judgment in one cannot affect the other, though the subject-matter of each is the same.[1]

§ 253. **Identity of Subject-matter.** — The principle is recognized and supported in most of the American cases, that a decision upon any material point is conclusive, though the subject-matter of the two suits is different[2]

La. Ann. 33; Miller *v.* McManis, 57 Ill. 126; Tucker *v.* Rohrback, 13 Mich. 75; Green *v.* Iredale, 13 S. C. 588; Carre *v.* New Orleans, 41 La. Ann. 996; Goodwin *v.* Snyder. 75 Wis. 450; State *v.* Jumel, 30 La. Ann., pt. 2, p. 861; McCamant *v.* Roberts, 66 Tex. 260; Gilbreath *v.* Jones, 66 Ala. 129.

[1] Linne *v.* Stout, 44 Minn. 110.

[2] Spencer *v.* Dearth, 43 Vt. 98; Betts *v.* Starr, 5 Conn. 550; 13 Am. Dec. 94, and note; Doty *v.* Brown, 4 N. Y. 71; 53 Am. Dec. 350; Williams *v.* Fitzhugh. 44 Barb. 321; Walker *v.* Chase, 53 Me. 258; Cromwell *v.* County of Sac, 94 U. S. 351; 4 Cent. L. J. 416; Rucker *v.* Steelman, 97 Ind. 222; Flanagan *v.* Thompson, 4 Hughes, 421; Sketchley *v.* Smith, 78 Iowa, 542.

N. sued R., a servant of C., for property. C. defended for his servant, claiming title under a chattel mortgage from H.; N. claimed under judgment against H., and sought to impeach the mortgage, on the ground that it was fraudulent as to creditors. At the trial, N. failing to prove his judgment, the decision was in favor of R. C. afterward sued N. for the same property, and contended that the judgment in favor of R., under the circumstances, was conclusive that the property belonged to C. N., to avoid the operation of the estoppel, contended, — 1. That in the former suit the chattel mortgage matter had not been determined; 2. That the parties were different. But it was held that the issues in the first suit were such that the findings of either in favor of C. constituted an estoppel. One issue was the *bona fides* of the mortgage, the other was the title of N. to the property in dispute, N. having failed to show that he was a judgment creditor, could not, on that account, raise the question of *bona fides*, and he is now estopped.[1] A verdict in a summary proceeding, to remove a tenant for non-payment of rent, finding that no rent is due, is conclusive in favor of the tenant, in a replevin suit brought by him to recover cattle distrained by the landlord, to satisfy the same claim of rent.[2] The only matter essential to making a former judgment on the merits conclusive between the same parties is, that the question to be determined in the second action is the same question *judicially* settled in the first. A judgment is conclusive not only as to the subject-matter in suit, but as to all other suits which, though concerning other subject-matters, involve the same questions of controversy.[3] A judgment in favor of a bondholder, upon certain municipal bonds against the town issuing them, is conclusive on the question of the validity of other bonds being part of the same issue, in an action between the same parties, all the objections and matters

[1] Castle *v.* Noyes, 14 N. Y. 329.
[2] White *v.* Coatsworth, 6 N. Y. 138.
[3] Gardner *v.* Buckbee, 3 Cow. 120; 15 Am. Dec. 256; Bouchaud *v.* Dias, 3 Denio, 238; Babcock *v.* Camp, 12 Ohio St. 11.

of defense in the second action having been equally available to the town in the first.[1] If A, as a defense to an action against him, pleads that he has been released from the liability, by virtue of his discharge in a proceeding for the relief of insolvent debtors, and the plaintiff seeks to avoid the discharge, on the ground that it was procured by fraud, a judgment for the defendant is conclusive in his favor upon the question of fraud, in any other action between the same parties, though upon a different contract.[2] If an issue is tried in any proceeding as to whether the defendant is a member of a firm, the result of the trial will be conclusive between the parties whenever the same issue again arises between them.[3] After a judgment has been recovered for a quarter's rent upon a lease, no defense can be made in a subsequent action for rent alleged to be due upon the same lease, substantially involving the same points decided against the defendant in the first suit.[4] If an instrument has been judicially construed, this construction must be adopted in every other controversy between the parties, in which the effect of the same instrument is brought in question.[5] A sold land to B, and agreed to cease keeping tavern on adjacent land as soon as B built certain buildings. B afterward recovered in an action for a breach of this agreement. In a second action, claiming damages for a subsequent breach, it was held that the only matters upon which defendant was not concluded were the subsequent breach and the amount of damages resulting from it.[6] If a suit to recover an installment of purchase-money is defended on account of an alleged failure of title occasioned by encumbrances, the decision of the court is conclusive

[1] Beloit *v.* Morgan, 7 Wall. 619; San Antonio *v.* Lane, 32 Tex. 411.

[2] Merriam *v.* Whittemore, 5 Gray, 316; Van Dolsen *v.* Abendroth, 43 N. Y. Sup. Ct. 470.

[3] Lynch *v.* Swanton, 53 Me. 100.

[4] Kelsey *v.* Ward, 38 N. Y. 83; Love *v.* Waltz, 7 Cal. 250; Jacobson *v.* Miller, 41 Mich. 90; Howlett *v.* Tarte, 10 Com. B., N. S., 813.

[5] Stewart *v.* Stebbins, 30 Miss. 66; Bloodgood *v.* Carsey, 31 Ala. 575; Tioga R. R. Co. *v.* B. & C. R. R. Co., 20 Wall. 137; Lorillard *v.* Clyde, 122 N. Y. 41; 19 Am. St. Rep. 470.

[6] Heichew *v.* Hamilton, 4 G. Greene, 317; 61 Am. Dec. 122.

upon that subject, in any future action, to recover a subsequent installment falling due on the same purchase.[1] After a decree in favor of plaintiff, upon a contract for the payment of money in installments, the only question open to litigation, in respect to any subsequent installment, is whether as to it the defendant is in default. Upon this question the defendant is entitled to a hearing; and if a sale is made without such hearing, for the purpose of paying a sum which has fallen due since the entry of the original decree, and which is alleged to remain unpaid, the sale is void.[2] The recovery by judgment, of a sum claimed to be due as interest on a promissory note, precludes the defendant from contesting the payment of the principal on the ground that the note was procured by fraud;[3] or upon any other defense involved in the former suit.[4] A note and a mortgage for its security, alleged to be made at the same time, are not necessarily inseparable. The note may have been delivered, and the mortgage not; or the former may have been obtained by fraud and duress, and the latter not. Hence, a judgment against the validity of the mortgage does not *per se* establish the invalidity of the note.[5] If an assessment is imposed on certain lots, payable in installments, the recovery on any installment unavoidably affirms the validity of the assessment, and precludes it from being controverted in a subsequent action between the same parties for subsequently accruing installments;[6] and on the other hand, where the issue of the certificate of a special assessment is restrained, on the ground that the contract with the city was unauthorized, the judgment is conclusive against the city or its assignee in an action to collect the amount of the assessment.[7] Some of the English courts, if we may judge from the opinions expressed by Lord Chelms-

[1] Kane *v.* Fisher, 2 Watts, 246.
[2] Perkins *v.* Perkins, 16 Mich. 162.
[3] Edgell *v.* Sigerson, 26 Mo. 583.
[4] Black River Savings Bank *v.* Edwards, 10 Gray, 387.
[5] Lander *v.* Arno, 65 Me. 26.
[6] People *v.* Brislin, 80 Ill. 423; Lehmer *v.* People, 80 Ill. 601.
[7] Lawrence *v.* Milwaukee, 45 Wis. 306.

ford, deny the application of the principle of *res judicata* to cases where the subject-matter of the two suits is not identical. Hence he determined that a judgment against one poor-rate was not binding in a controversy in reference to a subsequent rate, though the issues in the two controversies were the same.[1]

The effect of a judgment upon a subsequent action involving the same issues, but a different though similar subject-matter, has recently been very fully considered in the supreme court of the United States. The conclusion there reached is, that when any issue is in fact litigated and determined, such determination is conclusive upon the parties and their privies in any subsequent action in which the same issue is drawn in question, though the subject-matter of the action is different. In order to successfully invoke this rule, it must be shown that in the former action the issue was in fact litigated and decided. It is not sufficient that it was there so involved that it might have been litigated. With respect to the subject-matter of an action, each party must bring forward every cause of action or defense involved in the pleadings, and the judgment will often be conclusive not only upon the matters litigated, but also upon those which the parties might have litigated in that action. But in a subsequent action involving a different subject-matter, the former adjudication cannot be relied upon, unless it appears, not that the issue now presented was presented, and ought to have been litigated in the prior action, but further, that it was litigated and decided, as well as involved.[2] Thus where a suit to recover upon certain coupons failed, because it was not shown that the plaintiff was a purchaser of the bonds to which they were attached, for value and before maturity, he was held not to be estopped in an action on the bonds from showing that he did purchase them before maturity, it not appearing that this issue was

[1] Commissioners *v.* Inspectors, L. R. 1 H. L. S. 22.

[2] Cromwell *v.* County of Sac, 94 U. S. 351; 4 Cent. L. J. 416; Davis *v.* Brown, 94 U. S. 423; Russell *v.* Place, 94 U. S. 606.

the subject of controversy in the former suit.[1] So, also, the omission of the indorser of a series of notes, when sued upon one or more of them, to assert a defense equally available as against all of them does not preclude him from relying upon such defense when sued upon other notes of the same series.[2]

§ 254. **Identity of Purpose.** — It has been said that, the cause and object of the action being the same, the former judgment bars the suit; but the principle runs through nearly all the American cases, that a judgment is conclusive, if upon the direct point, though the objects of the two suits are different.[3] A judgment against the assignee

[1] Cromwell *v.* County of Sac, 94 U. S. 351. In this case Judge Field, delivering the opinion of the court, said: "In considering the operation of this judgment it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, including parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever. But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue, or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

[2] Davis *v.* Brown, 94 U. S. 423; Russell *v.* Place, 94 U. S. 606. The tendency in the English courts is to confine the effect of a judgment estoppel to the issues actually litigated: Goucher *v.* Clayton, 11 Jur., N. S., 107; 34 L. J. Ch. 239; 13 Week. Rep. 336.

[3] Note 261 to Phillipps on Evidence; Barker *v.* Cleaveland, 19 Mich. 230; but in Robinson *v.* Kruse, 29 Ark. 575,

of an insolvent debtor, in an action brought to set aside a conveyance, is conclusive against him in an action of trover, to recover of the same defendants any of the property included in the conveyance.[1] One who defends an action to recover for work, on the ground that the work was so done as to be of no value, and fails to establish his defense, is precluded from afterward maintaining any suit against the plaintiff for damages alleged to have arisen from the unskillful doing of the same work.[2]

§ 255. **Identity of Form of Action.** — By the rules of the civil as well as of the common law, "*res judicata* is not changed by a change in the form of action."[3] It is not material that the form of action be the same, if the merits were tried in the first.[4] A judgment for the defendant in trover, for conversion of goods, is a bar to an action against him for money had and received from the proceeds of the sale of the same goods. No party can bring the same cause of action twice to a final determination.[5] Hence judgment for defendant, in an action of trover, estops plaintiff from maintaining *assumpsit* for the value of the goods which in the former action were claimed to have been converted,[6] or trespass for taking them;[7] a decision against the claimant on a trial of the right of property concludes him in an action of trover against the same officer for converting the same property;[8] a judgment in favor of a bank, in an action against it for the

the recovery by plaintiff in replevin was decided not to prevent the defendant from sustaining an action against the former plaintiff for the conversion of the same property.

[1] Bigelow *v.* Winsor, 1 Gray, 299.

[2] Merriam *v.* Woodcock, 104 Mass. 326.

[3] Pothier on Obligations, pt. 4, c. 3, sec. 3, art. 4; Eastman *v.* Cooper, 15 Pick. 285.

[4] Moore *v.* Williams, 132 Ill. 589; Marsh *v.* Pier, 4 Rawle, 273; 26 Am. Dec. 131; White *v.* Martin, 1 Port. 215; 26 Am. Dec. 365; Owens *v.* Raleigh, 6 Bush, 656; Bell *v.* McCulloch, 31 Ohio St. 397; Sewell *v.* Scott, 35 La. Ann. 553; Lieb *v.* Lichtenstein, 121 Ind. 483; Harryman *v.* Roberts, 52 Md. 64; Thomas *v.* Merry, 113 Ind. 83; Hatch *v.* Coddington, 32 Minn. 92; Hellebush *v.* Richter, 37 Ohio St. 222; Edwards *v.* Baker, 99 N. C. 258; Schroers *v.* Fish, 10 Col. 599; Sanderson *v.* Peabody, 58 N. H. 116; Murphy *v.* De France, 101 Mo. 151.

[5] Lawrence *v.* Vernon, 5 Sum. 20; Hitchin *v.* Campbell, 2 W. Black. 778, 827; Ferrer's Case, 6 Coke, 7.

[6] Agnew *v.* Martin, 10 Smedes & M. 552; 48 Am. Dec. 772.

[7] Hite *v.* Long, 6 Rand. 457; 18 Am. Dec. 719.

[8] Kreuchi *v.* Dehler, 50 Ill. 176; Stevens *v.* Springer, 23 Mo. App. 375.

conversion of a note, is conclusive in its favor in a subsequent action against it by the same plaintiff for money had and received to his use, being the proceeds of the same note;[1] and a judgment for the defendant, in an action for malicious prosecution, has been held to bar a subsequent action for slander in making the same charge uttered before the bringing of the first action.[2] The form of the prior action is immaterial, if it was such as to permit a trial on the merits. If proper parties join issue upon a question of law or of fact, before a competent court, they must abide by the decision. Hence it was held in Louisiana that a party who had proceeded by rule or motion, and had in that manner had a complete hearing on the merits, resulting in a discharge of the rule, was barred from obtaining an injunction in an action brought for that purpose, unless he could show other facts than those existing at the time of discharging the rule.[3] Whether and when the decision of a motion is entitled to the effect of *res judicata* is a question upon which the authorities disagree, and which will be considered hereafter.[4] But "when one is barred *in any action*, real or personal, by a judgment on demurrer, confession, verdict, etc., he is barred as to that or the like action of the like nature for the same thing forever." [5]

§ 256. **Identity of Issues.** — It will be seen from examining the authorities already cited that to render any judgment or other final adjudication proceeding from a court of competent jurisdiction available as a bar in a second action between the same parties or their privies, two things only are essential, viz.: 1. That the issue in the second action, upon which the judgment is brought to bear, was a material issue in the first action, necessarily determined by the judgment therein;[6] 2. That the former

[1] State Bank *v.* Rude, 23 Kan. 143.
[2] Tedwell *v.* Witherspoon, 21 Fla. 359; 58 Am. Rep. 665.
[3] Trescott *v.* Lewis, 12 La. Ann. 197. See also Brown *v.* Moran, 42 Me. 44.
[4] *Post*, secs. 325-327.
[5] Westcott *v.* Brock, 2 Col. 335; Geisriter *v.* Sevler, 32 Ark. 522.
[6] Graceland Cemetery Co. *v.* People, 92 Ill. 619; Blackwell *v.* Bragg, 78 Va.

judgment was upon the merits. The chief difficulty in applying a former judgment to a present litigation arises from the necessity of determining what were the matters affirmed or denied by the former decision. In determining this question, it may be, and frequently is, impossible to obtain sufficient *data* to form any satisfactory conclusion, without looking beyond the *record* in the former suit, and ascertaining from any other competent evidence what were the real issues brought before the court, and necessarily entering into the consideration of the judgment. And whether the issues in the former action sufficiently appear from the record, or are made known by extrinsic proofs, the necessity still remains of deciding whether a matter controverted at the former trial was a material issue, or a mere matter of evidence brought forward to aid in establishing some material issue. Courts have, from time to time, endeavored to lay down general rules, or more properly speaking, general descriptions, by which to determine what questions are and what are not settled by a former adjudication. We shall now state some of these general descriptions, leaving the reader to harmonize them if he can, and feeling that if he cannot he is not less successful than we have been.

A judgment is conclusive upon every matter actually and necessarily decided in the former suit, though not then directly the point in issue. If the facts involved in the second suit are so cardinal that without them the former decision cannot stand, they must now be taken as conclusively settled. In an order of settlement, John G. and William G. were adjudged to be the lawful children of William G. and Esther G., and to have their settlement in a certain township. Afterward a contest arose in relation to the settlement of Esther G. Whereupon it was considered that as the settlement of the children depended

529; Bouchard *v.* Parker, 32 La. Ann. 535; Doty *v.* Brown, 4 N. Y. 71; 53 Am. Dec. 350; Sawyer *v.* Woodbury, 7 Gray, 499; 66 Am. Dec. 518; Newby *v.* Caldwell, 54 Iowa, 102; Huntley *v.* Holt, 59 Conn. 102; 21 Am. St. Rep. 71.

on that of their father, and on his marriage with their mother, Esther, the father's settlement and marriage must have been decided as the ground-work of the former order, and that as those facts which upheld the order of settlement of the children were necessarily and exclusively applicable to their mother, her settlement was fixed by the decision in relation to that of her children.[1] And in Vermont it was decided that the adjudication, upon an order of removal, that a woman had a settlement in W. was conclusive between the same parties in a proceeding to remove her illegitimate son, who, being a minor, could obtain no settlement for himself, and whose settlement was therefore necessarily identical with that of his mother.[2]

In a number of cases several notes were given in payment for property purchased of the payee; and in a suit on the first note due, the defense of want of consideration arising from fraud in the sale, or from the worthless character of the property sold, was made. In cases of this character, and in all other cases where several notes or other obligations are given, against all of which a particular defense is equally applicable, or where a single contract is payable in installments, if such defense is interposed against either note, obligation, or installment, and determined either to be or not to be an existing and sufficient defense, such determination is conclusive of the existence or non-existence of such defense in any subsequent action upon any other note, obligation, or installment.[3] To have this effect, it must appear that the defense passed upon in the former action, conceding it to have

[1] Regina *v.* Hartington, 4 El. & B. 780.

[2] Cabot *v.* Washington, 41 Vt. 168.

[3] Cleveland *v.* Creviston, 93 Ind. 31; 47 Am. Rep. 267; Bank of New London *v.* Ketchum, 66 Wis. 428; Gardner *v.* Buckbee, 3 Cow. 120; 15 Am. Dec. 256; Freeman *v.* Bass, 34 Ga. 355; 89 Am. Dec. 255; Mason L. Co. *v.* Butchel, 101 U. S. 638; Davis *v.* Hart, 66 Miss. 642; Trescott *v.* Barnes, 51 Iowa, 409; Aultman *v.* Mount, 62 Iowa, 674; French *v.* Smith, 88 Ind. 149; 45 Am. Rep. 454; Foster *v.* Konkright, 70 Ind. 123; Kilander *v.* Hoover, 111 Ind. 10; Furneaux *v.* First N. B., 39 Kan. 144; 7 Am. St. Rep. 541; Young *v.* Brehe, 19 Nev. 379; 3 Am. St. Rep. 892. *Contra*, Eastman *v.* Cooper, 15 Pick. 276; 26 Am. Dec. 60.

existed, was necessarily conclusive of the demand sued upon in the second action;[1] for it may have been a partial defense, applicable only to the demands against which it was interposed, or in the nature of a counterclaim for damages, which, being allowed and compensated in the first action, cannot again be set off or recovered in the second. A judgment for or against the validity of a coupon is generally conclusive for or against every other coupon attached to the same bond.[2] In New York, where A and B were sureties for the same person on two bonds, an action by A for contribution from B, for money paid upon one bond, was held to be conclusive in a like suit upon the other bond, the same defense being offered in both suits.[3] In New York it is well settled that the recovery by a physician of a judgment upon his claim for professional services is a conclusive affirmance of the valuable character of those services, and, as such, is a bar to any action against him for malpractice,[4] although the former judgment was rendered without any claim of malpractice being offered as a defense,[5] or although such defense was expressly withdrawn before going to trial.[6] E., a tenant, committed an act of bankruptcy. An assignee was appointed, who entered on the demised land, and drove off cattle to prevent their being distrained. They were pursued and seized by the landlord's bailiff. The assignee brought an action of replevin for the cattle. This action turned upon the question whether the assignee, by his entry, became a tenant; that is, whether he had elected to receive the lease instead of relinquishing it as *damnosa hereditas*. The action having been determined against him, it was held, in a subsequent

[1] Clark *v.* Sammons, 12 Iowa, 368; Knickerbocker *v.* Ream, 42 Kan. 17; Knorr *v.* Peerless Reaper Co., 23 Neb. 636; 8 Am. St. Rep. 140; Felton *v.* Smith, 88 Ind. 149; 45 Am. Rep. 454.

[2] Bissell *v.* Spring Valley, 124 U. S. 225; Whitaker *v.* Johnson County, 12 Iowa, 595; Block *v.* Bourbon Co., 99 U. S. 686.

[3] Bouchaud *v.* Dias, 3 Denio, 243.

[4] Edwards *v.* Stewart, 15 Barb. 67.

[5] Gates *v.* Preston, 41 N. Y. 113.

[6] Bellinger *v.* Craigue, 31 Barb. 534. See *post*, sec. 282.

controversy between him and the landlord, to conclusively establish his tenancy.[1]

If in any action based upon an alleged leasing the existence or validity of the lease is denied, or it is sought to be avoided on some ground, the judgment in such action is conclusive in all subsequent actions of the existence or non-existence, validity or non-validity, of such lease.[2] The same rule applies to other writings. If a writing is assailed on some ground, as where it is claimed to be fraudulent, forged, or altered, the determination of this question is conclusive in all subsequent controversies;[3] and if it is determined to be invalid because of the mental capacity of the person executing it, this is conclusive that other writings executed at the same time were invalid for the same reason.[4] So if a contract is construed, or a party is determined not to be entitled to its benefit, such construction[5] or determination[6] is conclusive in subsequent controversies.

A good illustration of the rule that the effect of a former adjudication extends to *every question* necessarily litigated between the parties, and is not confined to actions having the same purpose or involving the same subject-matter, is found in a case decided by the supreme court of California. J., W., and T. made a note in favor of D. T., being the owner of a tract of land, soon after conveyed it to D. After the maturity of the note, D. sued J., T., and W. upon

[1] Hancock *v.* Welsh, 1 Stark. 347. A gave a horse to B to board, with instructions not to use him. B used the horse and foundered him. A abandoned the horse and sued for his conversion. B then sued for the horse's board. A set up defense of the conversion. The justice, on demurrer, overruled this defense, and afterwards entered judgment against A for the horse's board. This was held to estop A from maintaining his action for conversion, because it was not possible for A to have been liable for the board, if B had previously converted the horse: Collins *v.* Bennett, 46 N. Y. 490.

[2] Wilson *v.* Deen, 121 U. S. 525; McWilliams *v.* Morrell, 23 Hun, 162; Jacobson *v.* Miller, 41 Mich. 90; Nemetty *v.* Mayor, 100 N. Y. 562; Oregonian R'y Co. *v.* Oregon R'y & N. Co., 27 Fed Rep. 277.

[3] Ballard *v.* Franklin L. I. Co., 81 Ind. 239; Hanna *v.* Read, 102 Ill. 596; 40 Am. Rep. 608; Yates *v.* Yates, 81 N. C. 397; Lawrence *v.* Milwaukee, 45 Wis. 306.

[4] Hanna *v.* Read, 102 Ill. 596; 40 Am. Rep. 608.

[5] Buchanan *v.* Smith, 75 Mo. 463; Lorillard *v.* Clyde, 122 N. Y. 41; 19 Am. St. Rep. 470; Robinson *v.* Fries, 22 Fla. 303.

[6] Noyes *v.* Kern, 94 Ill. 521.

it. J. made no defense. T. and W. answered that they were accommodation makers without any considerations, and that the deed to D. was made and accepted as a discharge of the note. Issue was taken upon this point, and the trial of the case was directed to the question whether the deed was accepted as a *security* or as *a satisfaction* of the debt. The jury found in favor of the defendants, and judgment was entered accordingly. Two days after the entry of this judgment, T. conveyed the same lands to J., who thereafter commenced suit against D. to recover them on the ground that the former deed to D. was a mortgage. It was held that the character of the deed was in issue in the former action, and that J. could not prove its character to be different from what it was then determined to be.[1]

The principle underlying and supporting all these decisions is, that a judgment necessarily affirming or denying a fact is conclusive of its existence whenever it becomes a matter in issue between the same parties or between parties in privity with them.[2] Therefore a judgment abating a nuisance to a public highway is conclusive of the existence both of the highway and of the nuisance;[3] a judgment for the defendant in an action for obstructing a watercourse, if based upon the ground that there was no watercourse to be obstructed, is in subsequent actions conclusive of the non-existence of such watercourse;[4] but if the judgment had been for the plaintiff, it would necessarily have been conclusive in other actions of the existence of the watercourse and of its obstruction.[5] If an action is brought to recover wages, and defended on the ground that there was no contract of hiring, or that the plaintiff had been rightfully discharged, the judgment affirming or denying either the contract or the rightfulness of the discharge is conclusive in subsequent actions

[1] Jackson *v.* Lodge, 36 Cal. 28.

[2] Gould *v.* Sternberg, 128 Ill. 510; 15 Am. St. Rep. 138.

[3] Brant *v.* Plumer, 64 Iowa, 33.

[4] Hahn *v.* Miller, 68 Iowa, 745.

[5] Byrne *v.* Minneapolis etc. R'y Co., 38 Minn. 212; 8 Am. St. Rep. 688; McLeod *v.* Lee, 17 Nev. 103.

in which the same issue is material.[1] A decision in a suit in equity to reform a description in a deed, that a survey must commence at a point designated, is conclusive of that question in a subsequent action of ejectment.[2]

If the issues in the second action are necessarily different from those in the first, the judgment in the latter is not conclusive of the former;[3] but one cannot, by tendering an immaterial issue in the second action, avoid the effect of an issue determined against him in the former suit.[4] Generally, if the issues in the second action are necessarily different from those in the first, and the cause of action or of defense alleged therein may co-exist with the matters determined in the former suit, the judgment therein is not conclusive of the second.[5] Hence a judgment for defendant in an action for seduction accomplished under promise of marriage is not conclusive in his favor in a subsequent action for a breach of promise of marriage; for he may have promised the marriage and been guilty of a breach of such promise, without having seduced plaintiff by reason thereof.[6] So if the cruelty which amounts to the abandonment of a wife does not necessarily entitle her to a divorce on the ground of extreme cruelty, the denial to her of a divorce on that ground is not conclusive in a second action by her seeking a divorce on the ground of abandonment resulting from the husband compelling her to live apart from him by means of the same acts of cruelty relied upon in the former suit.[7]

There is one class of actions in which a former judg-

[1] Strauss *v.* Meertief, 64 Ala. 299; 38 Am. Rep. 8; Kennedy *v.* McCarthy, 73 Ga. 346.

[2] Mueller *v.* Henning, 102 Ill. 646.

[3] Fairchild *v.* Lynch, 99 N. Y. 359.

[4] Montgomery *v.* Harrington, 58 Cal. 270.

[5] Bowen *v.* Mandeville, 95 N. Y. 237; Scully *v.* Lowenstein, 56 Miss. 652; Fishburne *v.* Ferguson, 85 Va. 321; Gilmer *v.* Morris, 30 Fed. Rep. 476; Lake Shore etc. R'y Co. *v.* People, 46 Mich. 193; Geneva Bank *v.* Riverside School Dist., 25 Fed. Rep. 629; Leonard *v.* Whitney, 109 Mass. 265; Palmer *v.* Hussey, 87 N. Y. 303; McIntyre *v.* Storey, 80 Ill. 127; Keator *v.* St. John, 42 Fed. Rep. 585; Sheble *v.* Strong, 128 Pa. St. 315; Hosford *v.* Wynn, 26 S. C. 130; Wixson *v.* Devine, 80 Cal. 385.

[6] Ireland *v.* Emmerson, 93 Ind. 1; 47 Am. Rep. 364.

[7] Rand *v.* Rand, 58 N. H. 536.

ment is conclusive, though the issues in the first action are different from those in the second; but where this is so, it is the law of election between inconsistent remedies, rather than the law of estoppel, which controls. Thus one defeated in an action wherein he elected to pursue a particular remedy may afterwards be denied a remedy open to him in the first place, had he then chosen to adopt it, if the facts essential to support the second action are necessarily inconsistent with those relied upon in the first. In several instances, cases have been determined upon this principle, which, in our judgment, did not necessarily fall within it. Thus judgments in favor of defendants in actions wherein they sued upon contracts have frequently, and perhaps uniformly, been held to debar plaintiffs from maintaining suits to reform such contracts.[1] So one suffering defeat in an action on a promissory note on the ground of its fraudulent alteration will not be permitted to recover on the original indebtedness;[2] and it has been held that a receiver of an insolvent estate failing in his attack upon a deed, upon the ground of its being without consideration, cannot afterwards assail it as a fraudulent preference.[3]

A few cases may be found determined in apparent obliviousness of the rule that an issue necessarily determined in one action cannot be relitigated in another between the same parties. Thus in an early case in New Hampshire, the plaintiff recovered damages for the non-fulfillment of a contract to work for a year, though he had defended an action against him by the defendant for two months' labor of the same year, on the ground of a special hiring for the whole year, and had failed in his defense.[4] In New Jersey, a chief of police was discharged on a certain day by the town council, if it had power to do so.

[1] Thomas v. Joslin, 36 Minn. 1; 1 Am. St. Rep. 624; Steinbach *v.* Relief Fire Ins. Co., 77 N. Y. 498; 33 Am. Rep. 655; Thwing *v.* Great W. Ins. Co., 111 Mass. 93; Washburn *v.* Great W. Ins. Co., 114 Mass. 175.

[2] Sykes *v.* Gerber, 98 Pa. St. 179.

[3] Patterson *v.* Wold, 33 Fed. Rep. 791.

[4] Town *v.* Nims, 5 N. H. 259; 20 Am. Dec. 578. See Metcalf *v.* Gilmore, 63 N. H. 174.

He commenced a suit for his salary, after the attempted discharge, and obtained judgment. He then sued for salary accruing after the commencement of the former action. It was conceded that the question of his discharge was decided in his favor in the first suit; but it was considered the question was not concluded in the second action because *it was a matter of law*.[1] So in Indiana, an adjudication, in an action to recover certain property, that the assignment under which plaintiff claimed was void on account of being tainted by fraud, was held to be confined in its effect to the *subject-matter* of that controversy, and not to impair the claim of the plaintiff to other property included in the same assignment.[2] An entirely similar opinion is supported by the courts of New Hampshire, on the grounds that the assignment is, in the first action, a matter of evidence, and not a matter in issue; and that the only issue before the court is, whether plaintiff has title to the subject-matter of the suit.[3]

§ 257. **Extends only to Facts in Issue.** — The former verdict is conclusive only as to facts directly and distinctly put in issue, and the finding of which is necessary to uphold the judgment.[4] The doctrine of estoppel is restricted to facts directly in issue, and does not extend to facts which may be in controversy, but which rest in evidence, and are merely collateral. "A fact or matter in issue is that upon which plaintiff proceeds by his action, and which the defendant controverts in his pleadings, while collateral facts are such as are offered in evidence to establish the matters or facts in issue."[5] "It must appear that the matter set up as a bar was in issue in the former suit. If a suit is brought to procure the entry of

[1] Bernhard *v.* City of Hoboken, 27 N. J. L. 412.

[2] Roberts *v.* Robeson, 27 Ind. 454.

[3] King *v.* Chase, 15 N. H. 9; 41 Am. Dec. 675; Taylor *v.* Dustin, 43 N. H. 493.

[4] Hunter *v.* Davis, 19 Ga. 413; De St. Romes *v.* C. C. & N. Co., 24 La. Ann. 331; Glass *v.* Wheeliss, 24 La. Ann. 397; Henry *v.* Davis, 13 W. Va. 230; Crum *v.* Boss, 7 Rep. 107.

[5] Garwood *v.* Garwood, 29 Cal. 521; King *v.* Chase, 15 N. H. 16; 41 Am. Dec. 675.

satisfaction of a mortgage, and the judgment is, that the mortgage is not satisfied because a specified amount remains unpaid, this judgment is, in subsequent controversies between the parties, conclusive that the mortgage was not paid, but the amount due is still unsettled, because it was not in issue in a former suit."[1] A decree setting aside a deed does not affect any title held by defendant, and not deraigned through such deed.[2] An estoppel extends beyond what appears on the face of the judgment to every allegation which, having been made on the one side and denied on the other, was at issue and determined in the course of the proceedings. It not only establishes the case of the plaintiff, but disproves or negatives that of the defendant.[3] The record of a former recovery is competent evidence in a second action "when the point in issue is the same in both, or when some question raised and to be passed upon in the last has already been determined in the first."[4] "It is not the object of the suit, the recovery, or fruits of the litigation alone, that constitutes the estoppel, but the facts put in issue and found, upon which the recovery is based,"—facts in issue as distinguished from the evidence in controversy.[5] It is not necessary to the conclusiveness of the former judgment that the issue should have been taken upon the precise point which it is proposed to controvert in the collateral action. It is sufficient if that point was essential to the former judgment.[6] "Every point which has been either expressly or by necessary implication in issue, which must necessarily have been decided in order to support the judgment or decree, is concluded."[7] "It is allowable to reason back from a judgment to the basis on which it

[1] Campbell *v.* Consalus, 25 N. Y. 613.

[2] Beeson *v.* Comley, 19 Mich. 103.

[3] Stevens *v.* Hughes, 31 Pa. St. 381.

[4] Sage *v.* McAlpin, 11 Cush. 165.

[5] Caperton *v.* Schmidt, 26 Cal. 479; 85 Am. Dec. 187. See also Phelan *v.* Gardner, 43 Cal. 306; Rogers *v.* Higgins, 57 Ill. 244; Chesapeake Co. *v.* Gettings, 37 Md. 276; Shepardson *v.* Cary, 29 Wis. 34.

[6] Lee *v.* Kingsbury, 13 Tex. 68; 62 Am. Dec. 546.

[7] Board of S. *v.* M. P. R. R. Co., 24 Wis. 124.

stands, upon the obvious principle that, where a conclusion is indisputable, and could have been drawn only from certain premises, the premises are equally conclusive and indisputable with the conclusion. But such an inference must be inevitable, or it cannot be drawn."[1] For as we have already shown, if a judgment necessarily determines a particular fact, that determination is conclusive, and requires the same fact to be determined in the same way in all subsequent actions between the same parties. And a fact is necessarily determined to exist or not to exist, if its existence or non-existence is required to support the judgment rendered.[2] Thus if a town plat is entitled to record only when properly acknowledged, an order directing it to be recorded establishes that it was so acknowledged;[3] if a party is entitled to property only by virtue of its devise to him, a decree distributing it to him is conclusive of the devise and its validity;[4] a judgment upon a note against the defendants as partners conclusively establishes their partnership at the time when the note was made.[5] And it has been held that an issue, not absolutely necessary to be determined, may become *res judicata* if presented by the pleadings, argued by counsel, and in fact decided by the court.[6]

§ 258. **Confined to Matters in Issue and Decided.** — No judgment or decree is evidence in relation to any matter which came collaterally in question, nor to any matter incidentally cognizable, or to be inferred from the judgment only by argument or construction.[7] An estoppel

[1] Burlen *v.* Shannon, 99 Mass. 200; 96 Am. Dec. 733; Lea *v.* Lea, 99 Mass. 493; 97 Am. Dec. 772.

[2] Duncan *v.* Bancroft, 110 Mass. 267; Davis *v.* Demming, 12 W. Va. 246; Dorris *v.* Erwin, 101 Pa. St. 239; School Dist. *v.* Stocker, 42 N. J. L. 115.

[3] Scott *v.* Des Moines, 64 Iowa, 438.

[4] Greenwood *v.* Murry, 26 Minn. 259.

[5] Dutton *v.* Woodman, 9 Cush. 255; 57 Am. Dec. 46.

[6] Almy *v.* Daniels, 15 R. I. 312.

[7] Kitson *v.* Farwell, 132 Ill. 327; Lawrence *v.* Hunt, 10 Wend. 81; 25 Am. Dec. 539; Jackson *v.* Wood, 3 Wend. 27; Wood *v.* Jackson, 8 Wend. 35; 22 Am. Dec. 603; Hopkins *v.* Lee, 6 Wheat. 109; Lewis and Nelson's Appeal, 67 Pa. St. 165; Howard *v.* Kimball, 65 Me. 308; Hammer *v.* Pounds, 57 Ala. 348; Land *v.* Keirn, 52 Miss. 341; Henry *v.* Davis, 13 W. Va. 230.

cannot be created by mere argument. A owned a saw-mill, and A and B owned a grist-mill, both of which were run by water from the same dam, and had wheels on the same level, and were equally affected by backwater from the mill of C, situate on the same stream. A brought an action against C for damages occasioned by water being backed upon his saw-mill, in which it was settled that C's dam backed the water so as to injure the saw-mill. A and B then sued for damages occasioned to their grist-mill, and upon trial it was found that C's dam did not back the water upon the grist-mill. After the judgment in favor of C, A commenced a second action against C for damages to the saw-mill. It was agreed that, upon the facts of the case, there ought to be the same finding in respect to both the saw-mill and the grist-mill. The court held that the former adjudication between A and C was upon the precise question now in controversy; that the judgment in the case concerning the grist-mill was, at most, not upon the same point involved in the present suit, but upon a fact which, by argument only, is shown to be applicable in this case; that this is not one adjudication against another, but only an adjudication one way, and a probable argument founded on another adjudication of a distinct question the other way. It leaves the effect of the first judgment untouched.[1] The correctness of this decision is doubtful. For we may argue from a judgment, and if the argument is so cogent that a particular conclusion cannot be avoided without denying effect to the judgment or denying some premises essential to its support, then the judgment supports the conclusion beyond further controversy. If, on the other hand, the judgment merely tends to show that the existence or non-existence of a fact is highly probable or highly improbable, it is not conclusive respecting such existence.[2]

[1] Mersereau *v.* Pearsall, 19 N. Y. 108.

[2] Sewall *v.* Robbins, 139 Mass. 164; McCravey *v.* Remson, 19 Ala. 430; 54 Am. Dec. 194; Dickinson *v.* Hayes, 31 Conn. 417; Koon *v.* Mallett, 68 Iowa, 205; Shall *v.* Biscoe, 18 Ark. 142; Lawrence *v.* Hunt, 10 Wend. 80; 25 Am. Dec. 539; Wahle *v.* Wahle, 71

During the trial of a cause, evidence may properly be received of the existence or non-existence of facts which, though they bear upon an issue and tend to show on which side of it the truth is, are not, though conceded to exist, necessarily conclusive. It is this class of facts which the courts have usually intended to designate by the terms "collateral," "incidental," or "not directly in issue," and therefore as not being proved or disproved by the judgment, though controverted at the trial, and perhaps passed upon by court or jury and exercising a controlling effect over the verdict and judgment. Still, if the judgment can be correct, whether the fact in question exists or not, it is not directly in issue, and therefore does not become *res judicata*.[1]

In determining what has been decided, and what has therefore become a binding adjudication, the actual judgment of the court must be consulted, and, so far as it speaks, must be allowed to control. Its clear import cannot be modified or controlled by the expressed opinions of the judges by whom it was pronounced, nor by the reasons urged by them in its support. In ascertaining whether a particular matter has become *res judicata*, the reasoning of the court is less to be regarded than the judgment itself, and the premises which its existence necessarily affirms.[2]

§ 259. **Identity of Evidence.** — The best and most invariable test as to whether a former judgment is a bar is to inquire whether the same evidence will sustain both

Ill. 570; Hymes *v.* Estey, 116 N. Y. 501; 15 Am. St. Rep. 421; Dryden *v.* St. Joseph etc. R. R. Co., 23 Kan. 525; Trimble *v.* Fariss, 78 Ala. 260.

[1] Henry *v.* Davis, 13 W. Va. 230; Hymes *v.* Estey, 116 N. Y. 501; 15 Am. St. Rep. 421; McKinney *v.* Curtis, 60 Mich. 611; Kidd *v.* Laird, 15 Cal. 161; 76 Am. Dec. 472; Smith *v.* Sherwood, 4 Conn. 276; 10 Am. Dec. 143; Cavanaugh *v.* Buehler, 120 Pa. St. 441; Stannard *v.* Hubbell, 123 N. Y. 520; Lorance *v.* Platt, 67 Miss. 183; Hubbard *v.* Flynt, 58 Miss. 266; Houser *v.* Ruffner, 18 W. Va. 244; Gilbert *v.* Thompson, 9 Cush. 348; Doonan *v.* Glynn, 28 W. Va. 715; Beckwith *v.* Thompson, 18 W. Va. 103; Wood *v.* Jackson, 8 Wend. 9; 22 Am. Dec. 603; Lentz *v.* Wallace, 17 Pa. St. 412; 55 Am. Dec. 569.

[2] McDonough's Succession, 24 La. Ann. 34; Plicque *v.* Perret, 19 La. 318; Hill *v.* Bowman, 14 La. 445; Buckner *v.* Calcote, 6 Cushman, 432.

the present and the former action.[1] If this identity of evidence is found, it will make no difference that the form of the two actions is not the same.[2] Thus a judgment for defendant in a suit for wheat cut and carried away is a bar to an action of trespass *quare clausum fregit* for cutting and carrying away the same wheat, because the estoppel depends, not on the identity of the *action*, but on the identity of the *proofs*.[3] Whatever be the form of action, the issue is deemed the same whenever it may in both actions be supported by substantially the same evidence.[4] If so supported, a judgment in one action is conclusive upon the same issue in any other suit, though the cause of action is different.[5] But where, as in Mississippi, an action of replevin must be brought within one year, but an action in trover may be maintained at any time within two years, a plaintiff, defeated in an action of replevin because it was brought after one year from the taking, may thereafter sustain trover for the same taking. In both cases the evidence required to support the plaintiff's cause of action, though in most respects identical, is not entirely so, because in the first action proof of taking *within a year* is indispensable, while in the second action such proof is entirely immaterial.[6] On the other hand, if different proofs are required to sustain two actions, a judgment in one of them is no bar to the other. If the evidence in a second suit between the same parties is sufficient to entitle plaintiff to a recovery, his right cannot be defeated by showing any judgment against him in

[1] Kitchen *v.* Campbell, 3 Wils. 304; Clegg *v.* Dearden, 12 Q. B. 576; Crockett *v.* Routon, Dud. (Ga.) 254; Hunter *v.* Stewart, 31 L. J. Ch. 346; Taylor *v.* Castle, 42 Cal. 371; Cannon *v.* Brame, 45 Ala. 262; Percy *v.* Foote, 36 Conn. 102; Gayer *v.* Parker, 24 Neb. 643; 8 Am. St. Rep. 227; Dawley *v.* Brown, 79 N. Y. 390; Riker *v.* Hooper, 35 Vt. 457; 82 Am. Dec. 646; Gates *v.* Goreham, 5 Vt. 317; 26 Am. Dec. 303; Marsh *v.* Pier, 4 Rawle, 273; 26 Am. Dec. 131.

[2] Ramsey *v.* Herndon, 1 McLean, 450; Martin *v.* Kennedy, 2 Bos. & P. 71; Duncan *v.* Stokes, 47 Ga. 595.

[3] Johnson *v.* Smith, 8 Johns. 383.

[4] Hitchin *v.* Campbell, 2 Black, 827; Outram *v.* Morewood, 3 East, 346; Birkhead *v.* Brown, 5 Sand. 134.

[5] Doty *v.* Brown, 4 N. Y. 71; 53 Am. Dec. 350.

[6] Johnson *v.* White, 13 Smedes & M. 584.

any action where the evidence in the present suit could not, if offered, have altered the result.[1] Thus a judgment against a vendor suing for purchase-money before it is due, or against the payee of a note, in an action against three, when the note was only the note of two, is no bar to a subsequent suit in the first-named case after the money is due, nor in the second case upon the note as the note of *two;* for in neither of these cases could evidence amply sufficient to maintain the second action have had any influence in the first.[2] For the same reason judgment for defendant in an action on a note as a contract to pay *money* is no bar to a suit against him on the same note as a contract to pay *money in foreign bills.*[3] Suit was brought on a promissory note alleged to be lost, and which was described as payable *on demand,* with interest from date. The defendant pleaded a former judgment in bar. In the previous suit the note was described as in this, except that it was alleged to be payable one *day after date.* It was held that as the issue joined in the former suit would not have permitted plaintiff to recover upon proof of a note payable on demand, the former judgment was not a bar.[4] An account stated operates as a change of the original indebtedness, and is in the nature of a new undertaking. An action upon it is not founded on the original items, but upon a balance ascertained by the mutual understanding of the parties.[5] Therefore if in an action on a contract the defendant introduces in evidence a judgment roll showing that plaintiff had previously commenced an action, setting forth the same contract, and alleging that a specified sum was due as an account stated,

[1] Gordon *v.* State, 71 Ala. 315; Cleary *v.* Folger, 84 Cal. 316; 18 Am. St. Rep. 187; Florida S. R'y *v.* Brown, 23 Fla. 106; Ireland *v.* Emmerson, 93 Ind. 1; 47 Am. Rep. 364; Stringer *v.* Adams, 98 Ind. 539; Ballou *v.* Billings, 136 Mass. 307; Nichols *v.* Marsh, 61 Mich. 509; Kirkpatrick *v.* McElroy, 41 N. J. Eq. 539; Marsh *v.* Masterson, 101 N. Y. 401; Belden *v.* State, 103 N. Y. 1; Scriver *v.* Eckenrode, 87 Pa. St. 213; Whaley *v.* Stevens, 24 S. C. 479.

[2] Kirkpatrick *v.* Stingley, 2 Cart. 273; N. E. Bank *v.* Lewis, 8 Pick. 113; United States *v.* Cushman, 2 Sum. 426; Lawrence *v.* Vernon, 3 Sum. 20.

[3] Jones *v.* Fales, 4 Mass. 255.

[4] Jones *v.* Fales, 4 Mass. 255.

[5] Pattison *v.* Jones, 27 Ind. 457.

in which action defendant prevailed, this recovery is no bar to the present suit. In deciding this point the court said: "A judgment is a bar, if the cause of action be the same, though the form be different. The cause is the same when the same evidence will support both actions; or rather, the judgment in the former action will be a bar, provided the evidence necessary to sustain the judgment for plaintiff in the present action would have authorized a judgment for him in the former. The present action would have been sustained upon proof of a contract and the performance on the part of plaintiff, and nonpayment by the defendants. This proof would not have sustained the former action. Therefore the judgment is not a bar." [1]

§ 260. **Merits.**—The estoppel arising from a judgment or decree is *not odious* because it is confined to those points which either were in fact litigated and determined between the parties or which were determined in the absence of any actual contest, but not until after a full legal opportunity was given both parties to make such contest as they might deem proper. It follows from this that no judgment can be available as an estoppel, unless it is a *judgment on the merits*.[2] But an occasional difficulty may arise in deciding what is a judgment on the merits as the term is generally employed by judges and lawyers. To create such a judgment, it is by no means essential that the controversy between plaintiff and defendant be

[1] Taylor *v.* Castle, 42 Cal. 371. So a note offered in evidence in an action on an account stated, and rejected because not admissible in that form of action, may be subsequently recovered upon an action thereon in proper form: Lindell *v.* Leggett, 1 Mo. 432; 14 Am. Dec. 298; and a failure to recover against one as a common carrier does not shield him from liability as a warehouseman: Kronshage *v.* C., M., & St. P. R'y Co., 45 Wis. 500.

[2] Taylor *v.* Larkin, 12 Mo. 103; 49 Am. Dec. 119; Bell *v.* Hoagland, 15 Mo. 360; Houston *v.* Musgrove, 35 Tex. 594; Verheim *v.* Strickhein, 57 Mo. 326; Mosby *v.* Wall, 23 Miss. 81; 55 Am. Dec. 71; Dixon *v.* Sinclair, 4 Vt. 354; 24 Am. Dec. 610; Carson *v.* Clark, 1 Scam. 113; 25 Am. Dec. 79; Gould *v.* Railroad, 91 U. S. 526; Pepper *v.* Donnelly, 87 Ky. 259; Detroit *v.* Houghton, 42 Mich. 459. Judgment by consent for defendant after a plea in abatement has been sustained is not on the merits: Jordan *v.* Siefert, 126 Mass. 25.

determined "on the merits," in the moral or abstract sense of those words. It is sufficient that the *status* of the action was such that the parties might have had their lawsuit disposed of according to their respective rights, if they had presented all their evidence, and the court had properly understood the facts and correctly applied the law.[1] But if either party fails to present all his proofs, or improperly manages his case, or afterward discovers additional evidence in his behalf, or if the court finds contrary to the evidence, or misapplies the law,—in all these cases the judgment, until corrected or vacated in some appropriate manner, is as conclusive upon the parties as though it had settled their controversy in accordance with the principles of abstract justice. Frequent instances occur tending to convince us of the unwelcome truth that many judgments which in law are regarded as being "on the merits" are in fact repugnant to any disposition of the rights of the parties "on the merits," as those words are employed in relation to the ordinary affairs of men. If in an action on a judgment the plea of *nul tiel* record is interposed, and the plaintiff fails owing to a defect in the certificate, he is estopped from afterward asserting the judgment, though its validity is free from doubt.[2] Assignees of a bankrupt, failing in a suit because they cannot prove an act of bankruptcy sufficiently early, cannot afterward maintain an action for the same demand, though they secure evidence for want of which they suffered the former defeat.[3] A former suit, in which the defendant recovered on the erroneous ground that the cause of action had not then accrued, is a bar to a further prosecution.[4] A plaintiff sued on a recognizance,

[1] Hughes *v.* United States, 4 Wall. 232; Lore *v.* Truman, 10 Ohio St. 45; Birch *v.* Funk, 2 Met. 544; Johnson *v.* White, 13 Smedes & M. 584; Agnew *v.* McElroy, 10 Smedes & M. 552; 48 Am. Dec. 772; Brackett *v.* Hoitt, 20 N. H. 257; Van Vleet *v.* Olin, 1 Nev. 95; Wilbur *v.* Gilmore, 21 Pick. 250; Keene *v.* Clark, 5 Rob. (N. Y.) 38; Kenan *v.* Miller, 2 Kelly, 325; Rogers *v.* Higgins, 57 Ill. 244; Parker *v.* Clift, 9 Lea, 524.

[2] Foltz *v.* Prouse, 15 Ill. 434.

[3] Stafford *v.* Clark, 1 Car. & P. 403.

[4] Morgan *v.* Plumb, 9 Wend. 287.

but failed in his suit because he did not prove that the recognizance had been filed as required by statute. It was held that the judgment precluded him from afterward alleging or proving that the filing existed prior to the former suit.[1] Certain justices, having jurisdiction to act, allowed several accounts, without giving them any particular consideration, supposing that several important matters of law were involved, and that an appeal lay to the quarter sessions. But it was decided that no such appeal could be taken. The justices, after the decision, were anxious to hear the matter on the merits. A *mandamus* being applied for to compel them to do so, Lord Denman, C. J., said: "We think we have no power to issue this *mandamus* to the justices to hear and decide upon the allowance of accounts, they having already done so, though under a mistaken notion that an appeal lay to the sessions, and though they are now anxious to enter on the merits of the case. To unravel the grounds and motives which may have led to the determination of a question once settled by the jurisdiction to which the law has referred it would be extremely dangerous; but many authorities prove that it is beyond our own competency, and there is none to the opposite effect."[2]

The most familiar instances of judgments not on the merits are those entered for some defect in the pleadings, preventing the plaintiff from putting in evidence his cause of action,[3] or in favor of the defendant upon some temporary defense or plea in abatement,[4] or because the action was prematurely brought, either before the debt sued upon became due, or before the plaintiff had made some demand or done some other act necessary to perfect his cause of action.[5]

[1] People *v.* Smith, 51 Barb. 360.

[2] Regina *v.* Yorkshire, 1 Ad. & E., N. S., 625.

[3] Doeter *v.* Furch, 76 Wis. 153; Rodman *v.* Michigan C. R. R. Co., 59 Mich. 395; Florida S. R. R. Co. *v.* Brown, 23 Fla. 104.

[4] Atkins *v.* Anderson, 63 Iowa, 739; Garrett *v.* Greenwell, 92 Mo. 120.

[5] Roberts *v.* Norris, 67 Ind. 386; Walbridge *v.* Shaw, 7 Cush. 560; Boyer *v.* Austin, 54 Iowa, 402; Crosby *v.* Baker, 6 Allen, 295; Morton *v.* Sweetser, 12 Allen, 134.

§ 261. **Judgments of Nonsuit,[1] of Non Prosequitur,[2] of Nolle Prosequi,[3] of Dismissal,[4] and of Discontinuance**[5] are exceptions to the general rule that when the pleadings, the court, and the parties are such as to permit of a trial on the merits, the judgment will be considered as final and conclusive of all matters which could have been so tried.[6] A nonsuit "is but like the blowing out of a candle, which a man at his own pleasure may light again."[7] Under no circumstances will such a judgment be deemed final, whether entered before or at the trial.[8] That such judgment was entered by the court upon an agreed statement of facts will not give it any force as an estoppel.[9] A judgment of nonsuit was entered against plaintiff on a certain count of his complaint for not replying to a special plea within the time required by the court. The effect of the judgment was held to be to turn plaintiff out of court, and to place him, as to such count, as though it had never been filed.[10] The dismissal of a claim against an insolvent

[1] Baudin *v.* Roliff, 1 Martin, N. S., 165; 14 Am. Dec. 181; Daggett *v.* Robins, 2 Blackf. 415; 21 Am. Dec. 752; Lowry *v.* McMillan, 8 Pa. St. 157; 49 Am. Dec. 501; Fleming *v.* Hawley, 65 Cal. 492; Pendergrass *v.* York Mfg. Co., 76 Me. 509; Holmes *v.* Chicago etc. R. R. Co., 94 Ill. 439; Cheeney *v.* Cooper, 14 Neb. 415; Manhattan L. I. Co. *v.* Broughton, 109 U. S. 121; Moreland *v.* Gardner, 109 Pa. St. 116.

[2] Howes *v.* Austin, 35 Ill. 412.

[3] Lambert *v.* Sandford, 2 Blackf. 137; 18 Am. Dec. 149.

[4] Jones *v.* Graham, 36 Ark. 383; Roberts *v.* Hamilton, 56 Iowa, 683; Hebler *v.* Shipp, 78 Ky. 64; Boyrg *v.* Gerding, 33 La. Ann. 1369; Craver *v.* Christian, 34 Minn. 397; Philpott *v.* Brown, 16 Neb. 387; Hughes *v.* Walker, 14 Or. 481; Bigley *v.* Jones, 114 Pa. St. 510; Fowlkes *v.* State, 14 Lea, 14; Jackson *v.* Elliott, 49 Tex. 62; Benware *v.* Pine Valley, 53 Wis. 527.

[5] Phelps *v.* Winona etc. R. R. Co., 37 Minn. 485; 5 Am. St. Rep. 867; Gibson *v.* Gibson, 20 Pa. St. 9; Lord *v.* Chadbourne, 42 Me. 429; 66 Am. Dec. 290; Muse *v.* Farmers' Bank, 27 Gratt. 252.

[6] Harvey *v.* Large, 51 Barb. 222; Audubon *v.* Excelsior Ins. Co., 27 N. Y. 216; People *v.* Vilas, 36 N. Y. 459; 93 Am. Dec. 520; Baudin *v.* Roliff, 1 Martin, N. S., 165; 14 Am. Dec. 81; Dana *v.* Gill, 1 J. J. Marsh. 242; 20 Am. Dec. 255; Harrison *v.* Wood, 2 Duer, 50; Merchants' Bank Ass'n *v.* Mariposa Co., 7 Robt. 225. With respect to judgments of dismissal other than those entered by agreement, see Wheeler *v.* Ruckman, 51 N. Y. 391; Kelton *v.* Jacobs, 5 Baxt. 574; Brown *v.* Kirkbride, 19 Kan. 588; Wanzer *v.* Self, 30 Ohio St. 378.

[7] March on Arbitraments, 215; cited in Clapp *v.* Thomas, 5 Allen, 158.

[8] Foster *v.* Wells, 4 Tex. 101; Pillow *v.* Elliott, 25 Tex. Supp. 322; Taylor *v.* Larkin, 12 Mo. 103; 49 Am. Dec. 119; Greely *v.* Smith, 1 Wood. & M. 181.

[9] Homer *v.* Brown, 16 How. 354; Bridge *v.* Sumner, 1 Pick. 371; Morgan *v.* Bliss, 2 Mass. 113; Derby *v.* Jacques, 1 Cliff. 425; Knox *v.* Waldoborough, 5 Me. 185.

[10] Howes *v.* Austin, 35 Ill. 396.

estate for want of proof has the same effect in Louisiana as a nonsuit, and will not support the plea of *res judicata*.[1] If, upon a trial before a justice of the peace, he expresses an opinion against the plaintiff, who thereupon withdraws his suit and pays the costs, this is but a dismissal of his suit, not affecting any future action.[2] Parol evidence will not be admitted to show that a cause was tried upon the merits, but that the justice entered a judgment of nonsuit because he supposed he could not enter any other.[3] In New York it is the duty of a justice of the peace before whom a cause has been tried and submitted to determine it. He cannot evade this duty by entering a judgment of nonsuit. If he attempts to do so, his judgment may be reversed upon appeal.[4] The prosecution of an appeal in such a case seems to be an idle ceremony, because the defendant is entitled to treat the judgment as a final adjudication upon the merits. "If the cause be submitted to the justice, and he take time to make up his judgment, the plaintiff cannot then voluntarily submit to a nonsuit. The case is *sub judice upon the merits*, and must be disposed of upon the merits; and I apprehend it is not then in the power of the justice to nonsuit the plaintiff. His determination of the case is equivalent to a verdict of a jury and a judgment thereon; and although he may call his judgment a judgment of nonsuit, and enter it accordingly, if the record or minutes of the trial show that it was rendered after the cause was submitted to him, and after he took time to deliberate, and *not at the trial*, it will be considered a judgment for the defendant, and will be a bar to any subsequent action."[5] But it seems to be well established in the same state that the fact that the cause was submitted for judgment must appear from the *docket* and *minutes* of the justice; and that when he has entered

[1] Allinet *v.* Creditors, 15 La. Ann. 130.
[2] Jones *v.* Walker, 5 Yerg. 428.
[3] Brintnall *v.* Foster, 7 Wend. 103.
[4] Young *v.* Hubbell, 3 Johns. 430; Hess *v.* Beekman, 11 Johns. 457; Peters *v.* Diossy, 3 E. D. Smith, 115.
[5] Elwell *v.* McQueen, 10 Wend. 522; Gillilan *v.* Spratt, 8 Abb. Pr., N. S., 15.

a judgment of nonsuit, it is not competent, for the purpose of showing that the decision was upon the merits, to put him upon the stand as a witness, and have him state the circumstances preceding the entry of the judgment. "It would be dangerous to permit an inquiry into the evidence and proceedings of a trial before the justice to show that the kind of judgment rendered by him was not such as he ought to have rendered, and to give effect to it as it should have been, rather than as it is."[1] A judgment was reversed upon appeal to the supreme court, and the cause remanded for further proceedings. The plaintiff, afterward becoming nonsuit, was allowed to bring another action, on the ground that the rule in reference to nonsuits was not altered by the cases having been in the appellate court.[2] "A dismissal or nonsuit not determining the rights of the parties cannot support the plea of *res adjudicata*. Nor will the reasoning and opinion of the court upon the subject, on the evidence adduced before it, have the force and effect of a thing adjudged, unless the subject-matter be definitely disposed of by the judgment."[3] "At common law there is no form of an entry in the books of a judgment dismissing an action. Every judgment against a plaintiff is either upon a *retraxit*, *non prosequitur*, nonsuit, *nolle prosequi*, discontinuance, or a judgment on an issue found by jury in favor of defendant, or upon demurrer. The inducements or preliminary recitals in these several kinds of judgment are variant, but the conclusion in each is always the same; it is as follows: 'Therefore it is considered by the court that plaintiff take nothing by his writ, and that the defendant go without day, and recover of plaintiff his costs.' Of these several judgments, none but a *retraxit* or one on the merits will bar subsequent actions."[4] In some of the states, judgments of dismissal seem to be entered after hearing and determining a cause on its merits, and are

[1] Brintnall *v.* Foster, 7 Wend. 104.
[2] Holland *v.* Hatch, 15 Ohio St. 464.
[3] Fisk *v.* Parker, 14 La. Ann. 491.
[4] Bond *v.* McNider, 3 Ired. 440.

equivalent to a general judgment in favor of the defendant. Where this practice prevails, if a judgment of dismissal appears to have been given after the trial and submission of the cause on the merits, it is *res judicata*.[1]

§ 261 a. **The Defendant's Motion for a Nonsuit is a Waiver** of his right to have judgment upon the merits, and also of his right to litigate new matter set up in his answer, and upon which he has demanded affirmative relief. In an action to quiet title, the court, on motion of defendant, ordered a nonsuit. He then offered to prove the new matter alleged by him, but the court refused to hear the evidence. This refusal, having been made the ground of an appeal, was sustained by the appellate court on the following grounds: "A defendant, conceiving that the plaintiff has failed to prove his case, may waive a motion for a nonsuit, and proceed to prove his own case, and have judgment on the merits. But if he move for a nonsuit, and the nonsuit be granted, he cannot proceed and have judgment on the merits, because, by reason of the nonsuit, the plaintiff is virtually out of court. A nonsuit granted on the motion of the defendant is equivalent, in its operation on the action, to a dismissal with the consent of the defendant."[2]

§ 262. **Retraxit and Dismissal by Agreement.** — Recently the supreme court of California considered the effect of a judgment of dismissal entered by agreement. Such a judgment was compared to that of a *retraxit* at common law, and the court were of the opinion that, like a *retraxit*, "such a dismissal, when had by such consent, amounts to the open and voluntary renunciation of a suit pending." The court adopted the language of Chief Justice Robinson of Kentucky, as follows: "It has frequently been decided by this court that the legal deduction from

[1] Best *v.* Hoppie, 3 Col. 137; Brothers *v.* Higgins, 5 J. J. Marsh. 658; Granger *v.* Singleton, 32 La. Ann. 898; Bledsoe *v.* Erwin, 33 La. Ann. 615; Amory *v.* Amory, 26 Wis. 152.

[2] Wood *v.* Ramond, 42 Cal. 644.

a judgment dismissing a suit 'agreed' is, that the parties had, by their agreement, adjusted the subject-matter of the controversy in that suit; and the legal effect of such a judgment is, therefore, that it will operate as a bar to any other suit between the same parties, on the identical cause of action then adjusted by the parties, and merged in the judgment therein rendered at their instance and in consequence of their agreement."[1] These decisions are not intended to conflict with the rules universally understood as applying to voluntary dismissals in the absence of an agreement. To avoid all misapprehension on this subject, the court in California said: "We are not to be understood as holding that a mere dismissal of an action by the plaintiff under the statute, and without any agreement upon his part to do so, is to be held to constitute a bar to its renewal, nor that a judgment of nonsuit, even entered by consent, would have that effect, but only that a *judgment of dismissal*, when based upon and entered in pursuance of the *agreement of the parties*, must be understood, in the absence of anything to the contrary expressed in the agreement, and contained in the judgment itself, to amount to such an adjustment of the merits of the controversy, by the parties themselves, through the judgment of the court, as will constitute a defense to another action afterward brought upon the same cause of action."[2] That the dismissal of an action by agreement is equivalent in its effect to a *retraxit* is now generally conceded;[3] and a *retraxit* has always been deemed a judgment on the merits against the plaintiff, estopping him from subsequently maintaining an action for the cause renounced by his *retraxit*.[4]

[1] Bank of Commonwealth *v.* Hopkins, 2 Dana, 395. See also Jarboe *v.* Smith, 10 B. Mon. 257; 52 Am. Dec. 541; Phillpotts *v.* Blaisdel, 10 Nev. 19; Hoover *v.* Mitchell, 25 Gratt. 387. *Contra*, Hoffman *v.* Porter, 2 Brock. 156.

[2] Merritt *v.* Campbell, 47 Cal. 542.

[3] Crossman *v.* Davis, 79 Cal. 603; United States *v.* Parker, 120 U. S. 89; Wohlford *v.* Compton, 79 Va. 333. This effect was denied to a judgment of "dismissed agreed" in an action of ejectment: Stockton *v.* Copeland, 30 W. Va. 674.

[4] Coffman *v.* Brown, 7 Smedes & M. 125; 45 Am. Dec. 299; Lowry *v.* McMillan, 8 Pa. St. 157; 49 Am. Dec. 501; Cunningham *v.* Schley, 68 Ga. 105; Harris *v.* Preston, 10 Ark. 201; Crawford *v.* Glass, 11 Ired. 118.

§ 263. **Judgments not on Merits.** — Mr. Smith, in his Leading Cases, divides those judgments which are not a bar to another action, because not on the merits, into the following classes: —

1. Where the plaintiff fails for want of jurisdiction in the court to hear his complaint or to grant him relief;
2. Where he has misconceived his action;
3. Where he has not brought the proper parties before the court;
4. Where the decision was on demurrer, and the complaint in the second suit sets forth the cause of action in proper form;
5. Where the first suit was prematurely brought;
6. Where the matter in the first suit is ruled out as inadmissible under the pleadings.[1]

§ 264. **Want of Jurisdiction.** — There can be no doubt that the dismissal of an action for want of jurisdiction is not a judgment on the merits, and cannot prevent the plaintiff from subsequently prosecuting his action in any court authorized to entertain and determine it.[2] Nor can a judgment of a court having no jurisdiction to enter it create an estoppel for or against any one, whether it purports to be on the merits or not.[3] In Massachusetts, a widow may present her petition to the probate court to have her homestead set off from the rest of the estate of her deceased husband. If, however, the heirs dispute her claim, the court is ousted of all further jurisdiction in the matter, and the issue formed between her and the heirs must be tried in some other court. But a widow having presented her petition, and the heirs having filed their opposition, the probate court proceeded to hear the

[1] Smith's Lead. Cas. 673.

[2] Smith *v.* McNeil, 109 U. S. 426; Roberts *v.* Hamilton, 56 Iowa, 683; Smith *v.* Adams, 24 Wend. 585; Green *v.* United States, 18 Ct. of Cl. 93; Keokuk etc. R'y Co. *v.* Donnell, 77 Iowa, 221.

[3] Blin *v.* Campbell, 14 Johns. 432; Offutt *v.* Offutt, 2 Har. & G. 178; Schindell *v.* Suman, 13 Md. 310; State *v.* Odell, 4 Blackf. 156; Commonwealth *v.* Peters, 12 Met. 387; Thompson *v.* State, 6 Neb. 102.

matter as though it had jurisdiction, and after a trial, in which all the parties in interest participated, entered a decree denying the petition, on the ground that the petitioner *had no homestead right.* In proceedings before a court of competent jurisdiction, she afterward sought to assert her claim to the homestead. It was opposed on the ground that by the decree of the probate court her rights had been terminated. But the supreme court, in considering the effect of the decree, said: "It is then further urged that if this be so, yet it is not competent for the tenant, who was the petitioner to the probate court, to set up want of jurisdiction in reply to the plea in bar in this suit, even if it might have availed her in the probate court or on an appeal. But we think this an erroneous view of the matter, and that these judgments of the probate court are to be treated as wholly void. They would have been so if in her favor, and they ought to have no more effect having been against her."[1] While a court may have jurisdiction of the parties to the action, and for certain purposes or to a certain extent may be authorized to determine some of the issues in controversy, yet if it goes beyond the bounds of its authority, its decision as to these matters not within its jurisdiction cannot acquire the force of *res judicata.*[2]

§ 265. **In Misconceived Actions.** — The second subdivision includes all judgments rendered on the ground that conceding the plaintiff to have a cause of action upon which he is entitled to a remedy, yet he is not entitled to so recover under the remedy or form of action which he has chosen.[3] The exception which takes these cases out of the general rules in relation to estoppel is a very important one, saving the plaintiff from the loss of his claim, through any error of judgment on the part of his attorney in determining what form of action is best suited for the

[1] Mercier *v.* Chace, 9 Allen, 242.
[2] Houston *v.* Musgrove, 35 Tex. 594.
[3] Basom *v.* Taylor, 39 Mich. 682; Kittredge *v.* Holt, 58 N. H. 191; Charles *v.* Charles, 13 S. C. 385.

enforcement of the plaintiff's rights.[1] Wherever the adoption of a code of civil procedure has obviated the necessity of choosing between different forms of action, the number of cases in which plaintiffs will be obliged to invoke the protection of this exception will be much less than if the common-law rules were still in force. If, by mistake, plaintiff brings trespass instead of trover, and judgment is given against him *on that account*, the defendant cannot successfully assert it as a bar to a subsequent action of trover.[2] If a defendant, in an action against him on a promissory note, obtains judgment on a plea of infancy, the note being given by him for a chattel which he had obtained through fraud, and had refused to deliver to the owner on demand, an action in tort may still be maintained for the conversion of the chattel.[3] A plaintiff who, bringing an action of replevin for a sum of money, is defeated in that action because it lies to recover only things existing *in specie*, is not estopped by the judgment against him from prosecuting a subsequent action as upon the contract for the same sum of money. The former judgment is conclusive that the defendant did not have the *specific money;* but it does not determine whether he is liable for money had and received.[4]

§ 266. **Defect of Parties.**— A judgment given because of a misjoinder or non-joinder of parties plaintiff or defendant, or because of the want of capacity of a party plaintiff or defendant to sue or to be sued, establishes nothing but such defect or incapacity, and cannot defeat a subsequent suit in which the vice causing the former judgment does not exist.[5] If, however, though there was a defect in the

[1] Foster *v.* Wells, 4 Tex. 101; Livermore *v.* Herschell, 3 Pick. 33; Wyman *v.* Dorr, 3 Greenl. 185.

[2] Chitty's Pleading, 198.

[3] Walker *v.* Davis, 1 Gray, 506.

[4] Sager *v.* Blain, 44 N. Y. 445.

[5] McCall *v.* Jones, 72 Ala. 368; Tiffany *v.* Stewart, 60 Iowa, 207; Smith *v.* Auld, 31 Kan. 262; Richardson *v.* Richards, 36 Minn. 111; Weinberger *v.* Merchants' Ins. Co., 41 La. Ann. 31; Tierney *v.* Abbott, 46 Wis. 329; St. Romes *v.* Levee Cotton Press Co., 127 U. S. 614; Robbins *v.* Wells, 1 Rob. (N. Y.) 666; Corl *v.* Riggs, 12 Mo. 430; Wheeler *v.* Ruckman, 7 Rob. (N. Y.) 447; 35 How. Pr. 350; White *v.* Gaines, 29 La. Ann. 769.

parties, the action was tried and determined on the merits, the force of the judgment as an estoppel is not lessened by such defect.[1]

§ 267. **Judgments on Demurrer.** — A judgment on demurrer to the plaintiff's complaint is conclusive of everything necessarily determined by it. If the court decides that plaintiff has not stated facts sufficient to constitute a cause of action, or that his complaint is otherwise liable to any objection urged against it, such decision does not extend to any issue not before the court on the hearing of the demurrer. It leaves the plaintiff at liberty to present his complaint in another action so corrected in form or substance as to be no longer vulnerable to the attack made in the former suit.[2] But a judgment upon demurrer may be a judgment on the merits. If so, its effect is as conclusive as though the facts set forth in the complaint were admitted by the parties or established by evidence submitted to the court or jury. No subsequent action can be maintained by the plaintiff if the judgment is against him, on the same facts stated in the former complaint.[3] If any court errs in sustaining a demurrer and entering judgment for defendant thereon, when the complaint is sufficient, the judgment is nevertheless "on the merits." It is final and conclusive until reversed on appeal. Until then the plaintiff cannot disregard it and maintain another action. The effect of a judgment still in force is never diminished on account of any mistake of law on which it is founded.[4] A judgment in favor of defendant on demurrer to an answer is a bar

[1] Gerardin *v.* Dean, 49 Tex. 243.

[2] Robinson *v.* Howard, 5 Cal. 428; Gerrish *v.* Pratt, 6 Minn. 53; Gilman *v.* Rives, 10 Pet. 298; Nickelson *v.* Ingram, 24 Tex. 630; Birch *v.* Funk, 2 Met. (Ky.) 544; Wells *v.* Moore, 49 Mo. 229; Spicer *v.* United States, 5 Nott & H. 34; Gould *v.* Evansville etc. R. R. Co., 91 U. S. 526; Stowell *v.* Chamberlain, 60 N. Y. 272; Bonnifield *v.* Price, 1 Wyo. Ter. 223.

[3] Clearwater *v.* Meredith, 1 Wall. 25; Aurora City *v.* West, 7 Wall. 82; Nowlan *v.* Geddes, 1 East, 634; Bouchaud *v.* Dias, 3 Denio, 244; Goodrich *v.* City, 5 Wall. 573; Perkins *v.* Moore, 16 Ala. 17; Gould *v.* Evansville etc. R. R. Co., 91 U. S. 526; Felt *v.* Turnure, 48 Iowa, 397; Nispel *v.* Laparle, 74 Ill. 306.

[4] Vallandingham *v.* Ryan, 17 Ill. 25.

to a subsequent suit for the same cause of action.[1] If a demurrer is interposed to a good plea in bar, it will estop the plaintiff, though his declaration is defective, because his demurrer confesses the grounds of defense.[2] Although an answer has been filed, yet if judgment is entered against plaintiff upon the pleadings for defects in his complaint, this, like judgment upon demurrer, is no bar to a subsequent suit in which the cause of action is sufficiently set forth.[3] If a demurrer is overruled, and a judgment thereupon entered, it is on the merits, and is necessarily conclusive, in favor of the party against whom the demurrer was interposed, of the material facts confessed thereby, and that they entitle him to the relief given. The judgment is as effective as an estoppel as though the facts had been put in issue and established by a verdict.[4] If, on the other hand, a demurrer is sustained and a judgment entered thereon, this is a decision that upon the facts stated in the complaint the plaintiff is not entitled to recover. To that extent it is upon the merits, and he must necessarily fail in every subsequent action based upon the same facts as those disclosed by his pleading in the former action;[5] but it may be that the plaintiff had a good cause of action, and failed only because his pleading did not allege all of the facts, or was otherwise defective in form or substance. Then the question arises whether he may, upon a proper and sufficient pleading, recover in a second action. There are cases which proceed upon the theory that if a party, at the time of commencing an action, has a good cause therefor, he must allege it in his pleading, and that if he fails to do so and

[1] Wilson *v.* Ray, 24 Ind. 156.
[2] Lampen *v.* Kedgewin, 1 Mod. 207.
[3] Gerrish *v.* Pratt, 6 Minn. 53.
[4] Bissell *v.* Spring Valley, 124 U. S. 225; Coffin *v.* Knott, 2 G. Greene, 582; 52 Am. Dec. 537; Johnson *v.* Pate, 90 N. C. 334.
[5] McLaughlin *v.* Doane, 40 Kan. 392; 10 Am. St. Rep. 210; Parkes *v.* Cliff, 9 Lea, 624; Brown *v.* District of Columbia, 19 Ct. of Cl. 445; Gray *v.* Gray; 34 Ga. 499; Carey *v.* Giles, 10 Ga. 9, Parker *v.* Spencer, 61 Tex. 155; Bomar *v.* Parker, 68 Tex. 435; Carlin *v.* Brackett, 38 Minn. 307; Los Angeles *v.* Mellus, 58 Cal. 16; Felt *v.* Turner, 48 Iowa, 397; Woolley *v.* Louisville Banking Co., 81 Ky. 527; Francis *v.* Wood, 81 Ky. 16; Dixon *v.* Zadex, 59 Tex. 529.

a demurrer to his complaint is sustained and a judgment entered thereon, he cannot, in a subsequent action, by a complaint not subject to the objections interposed in the former action, recover for the same matters for which he might have recovered in the first instance had he properly disclosed them in his pleading at that time.[1] But the decisions to the opposite effect are very numerous, and establish, almost beyond controversy, that a judgment sustaining a demurrer to a demurrable complaint cannot be successfully pleaded in bar to a subsequent action in which the complaint is perfect, though the plaintiff might, had he chosen to do so, have made the same allegations in the first action as in the second.[2]

§ 268. **Premature Suits.** — That a judgment obtained for the reason that an alleged demand is not yet due is no bar to an action brought on the same demand after it has fallen due is a universally acknowledged rule applicable to every case in which a judgment can be rendered against any one because he has undertaken to assert a claim which has yet to ripen into a cause of action.[3] A suit upon a bond before condition broken, in which plaintiff fails on that account to recover, is no bar to any action brought against the same defendant after condition broken.[4] When a vendee brought an action to recover money paid by him as purchase-money for a tract of land, and failed because he had not yet been evicted, he was allowed to maintain a subsequent action upon showing

[1] Lamb *v.* McConkey, 76 Iowa, 47; Price *v.* Bonnifield, 2 Wyo. Ter. 80; Smith *v.* Hornsby, 70 Ga. 552; Ruegger *v.* Indianapolis etc. R. R. Co., 103 Ill. 449.

[2] Moore *v.* Dunn, 41 Ohio St. 62; Bonnifield *v.* Price, 1 Wyo. Ter. 240; Pritchard *v.* Woodruff, 36 Ark. 196; Grotenkemper *v.* Carver, 4 Lea, 375; Halcombe *v.* Heywood County Comm'rs, 89 N. C. 346; Lockett *v.* Lindsay, 1 Idaho, N. S., 324; Detrick *v.* Sharrar, 95 Pa. St. 521; Rodman *v.* Michigan etc. R. R. Co., 59 Mich. 395; Morrell *v.* Morgan, 65 Cal. 575; Skinner *v.* Dayton, 10 Johns. 513; 10 Am. Dec. 286; Keater *v.* Hock, 16 Iowa, 23; Terry *v.* Hammond, 47 Cal. 32; Estep *v.* Larsh, 21 Ind. 190; Los Angeles *v.* Mellus, 59 Cal. 444.

[3] Krapp *v.* Eldridge, 33 Kan. 106; Tracy *v.* Merrill, 103 Mass. 280; Dillinger *v.* Kelly, 84 Mo. 561; Maxwell *v.* Clarke, 139 Mass. 112; Wood *v.* Faut, 55 Mich. 185; Conn *v.* Bernheimer, 67 Miss. 498; Brackett *v.* People, 115 Ill. 29; Garrett *v.* Greenwell, 92 Mo. 120.

[4] McFarlane *v.* Cushman, 21 Wis. 401.

his eviction since the former suit.[1] If a suit is brought for several demands, some of which are due and others of which are not due, and a general verdict is given for the plaintiff, he may show in a second suit, for the demands not due at the trial of the first suit, that though presented to the court or jury, they were disallowed because not yet due.[2] If from the record in the first suit it appears that the demands were prematurely sued upon, it will be presumed that they were on that account rejected by the jury, and that they form no part of the judgment. But it may be shown that the demand, though not due, was not objected to by the defendants, and was allowed by the jury.[3] Under the code the same answer may present permanent defenses along with those of a temporary nature. Thus to an action upon a draft, the defendant may answer, — "1. That the draft is usurious; 2. That it is paid; and 3. That the suit is premature, because defendant has not been allowed days of grace." If this action should proceed to trial, resulting in a finding in favor of the defendant upon each of these issues, followed by a general judgment in his favor, such judgment will be as conclusive in relation to the *permanent* defenses of payment and usury as upon the *temporary* defense in relation to the days of grace. If the plaintiff believes that the findings are correct as to the temporary, and incorrect as to the permanent, defenses, he must, to preserve his rights, take such proceedings as will enable him to overthrow the findings upon the permanent defenses, and to obtain a judgment without prejudice to a subsequent action.[4]

§ 269. **Claims not Admissible.** — Any claim of the plaintiff which is offered by him, but is ruled out because not admissible under his pleadings, is, *if it were not ad-*

[1] Hurst *v.* Means, 2 Sneed, 546.
[2] Kane *v.* Fisher, 2 Watts, 246; Bull *v.* Hopkins, 7 Johns. 22.
[3] Crouse *v.* Miller, 10 Serg. & R. 155; Kane *v.* Fisher, 2 Watts, 246; Yaldon *v.* Hubburd, Com. Rep. 321.
[4] Sheldon *v.* Edwards, 35 N. Y. 279.

*missible*, to be afterward treated as though it had not been offered.[1] Not being involved in the issues, it cannot become *res judicata*, unless, without objection by the defendant or through error of the court, it is allowed and becomes a part of the judgment. If, however, the court erroneously rejects a claim as inadmissible, when it should be admitted, this error must be corrected upon appeal, and, until reversed, the judgment is conclusive against the rejected claim. On the other hand, though a cause of action or of defense is so imperfectly alleged that the court ought to exclude evidence offered to support it, yet if the court decides otherwise, and receives the evidence when offered, and thereafter decides it to be insufficient, or to be overcome by countervailing evidence, the decision is conclusive, and cannot be avoided on the ground that the court erred in regarding the pleading as sufficient to present the question upon which the evidence was offered and received.[2] Where a defendant in *scire facias*, on *nul tiel* record pleaded, prevailed because the *scire facias* stated the judgment to be against *James H. Green*, and the record offered was against *James Green*, it was held that this was no bar to a second *scire facias*.[3] So an acquittal upon an indictment charging the burning of the barn of *Josiah T.* is no bar to a prosecution for burning the barn of *Josias T.*[4]

§ 270. **Dismissal of a Bill in Equity.** — "The dismissal of a bill in chancery stands nearly on the same footing as a judgment at law, and will be presumed to be a final and conclusive adjudication on the merits, whether they were or were not heard and determined, unless the contrary is apparent on the face of the pleadings or in the decree of the court."[5] Only two cases have come under our obser-

[1] Baker *v.* Rand, 13 Barb. 152; Harding *v.* Hale, 2 Gray, 399; De Graaf *v.* Wychoff, 118 N. Y. 1; Millard *v.* Missouri etc. R. R. Co., 86 N. Y. 441.

[2] Chouteau *v.* Gibson, 76 Mo. 38.

[3] Benton *v.* Duffy, Cam. & N. 98.

[4] Commonwealth *v.* Mortimer, 2 Va. Cas. 325.

[5] 2 Smith's Lead. Cas. 667; Wilcox *v.* Balger, 6 Ohio, 406; Taylor *v.* Yarborough, 13 Gratt. 183; Scully *v.* Chicago etc. R. R. Co., 46 Iowa, 528;

vation in which the decree dismissing a bill has not been considered as necessarily final and conclusive,[1] while the cases are numerous sustaining the view that such dismissal is a bar to any subsequent bill, unless it appears on the record to have been made without prejudice, or otherwise not on the merits.[2] If in fact a decree is rendered dismissing a bill because of some defect in the pleadings, or for want of jurisdiction, or because complainant has an adequate remedy at law, or on any other ground not involving the merits, it is the general practice, both in England and in the United States, to state in the decree that the dismissal is without prejudice; and the omission of these words is an error which will be corrected upon appeal.[3] If a decree on its face dismisses a bill for want of equity, its effect as *res judicata* cannot be avoided by showing that the cause was not heard, but that the plaintiff failed to appear, and the judgment was not on the merits.[4] A dismissal of a libel for divorce in Massachusetts stands on the same footing as the dismissal of a bill in equity; and, unless it appears on its face to be made "without prejudice," will be a bar to another libel for the same cause.[5] Where the plaintiff did not in his bill show any interest or liability requiring the aid or

Adams *v.* Cameron, 40 Mich. 506; Cochran *v.* Couper, 2 Del. Ch. 27; Thompson *v.* Clay, 3 T. B. Mon. 359; 16 Am. Dec. 108; Case *v.* Beauregard, 101 U. S. 688; Strang *v.* Moog, 72 Ala. 460; McDonald *v.* Mobile L. I., 65 Ala. 358; Stickney *v.* Goudy, 132 Ill. 213; Tilley *v.* Bridges, 105 Ill. 336; Knowlton *v.* Hanbury, 117 Ill. 471; Granger *v.* Singleton, 32 La. Ann. 894; Parkes *v.* Clift, 9 Lea, 524; Murdock *v.* Haskill, 7 Baxt. 22; Blackinton *v.* Blackinton, 113 Mass. 231; Pelton *v.* Mott, 11 Vt. 148; 34 Am. Dec. 678.

[1] Wright *v.* De Klyne, 1 Pet. C. C. 199; Chase's Case, 1 Bland, 206; 17 Am. Dec. 277.

[2] Kelsey *v.* Murphy, 26 Pa. St. 78; Perine *v.* Dunn, 4 Johns. Ch. 142; Neafie *v.* Neafie, 7 Johns. Ch. 1; 11 Am. Dec. 380; Foote *v.* Gibbs, 1 Gray, 412; Parrish *v.* Ferris, 2 Black, 606. The English rule seems to permit the complainant to show that the dismissal of his bill was not on the merits, although the record does not state it was "without prejudice": Beere *v.* Fleming, 13 I. R. C. L. 506; Longmead *v.* Maple, 18 Com. B., N. S., 255; 11 Jur., N. S., 177; 13 Week. Rep. 469; 12 L. T., N. S., 143.

[3] Durant *v.* Essex Co., 7 Wall. 107.

[4] Lyon *v.* Perin & G. Mfg. Co., 125 U. S. 698; Gove *v.* Lyford, 44 N. H. 525; Wilcox *v.* Badger, 6 Ohio, 406. Nor can the effect of the decree be avoided by showing that it was entered in consideration of an agreement in writing made by plaintiff, and which he has failed to perform: Hicks *v.* Aylsworth, 13 R. I. 562.

[5] Thurston *v.* Thurston, 99 Mass. 39.

interference of a court of equity, and it was dismissed on that ground, he will not be estopped from bringing a new bill stating matters sufficient to authorize the action of the court.[1] If a bill filed does not bring before the court all the parties necessary for a proper determination of the suit, but the bill, instead of being dismissed on that account, is dismissed *for want of equity*, this is a bar to any future bill seeking the same relief.[2] A bill to redeem was filed. The defendant having answered, the plaintiff failed to reply, and, without the knowledge of the defendant, dismissed the suit. The defendant afterward had judgment entered in his favor for costs. It was held, the bill being dismissed without any restriction, that this was a judgment on the merits, and as such it was a bar to any future bill for the same cause.[3] If a bill by a vendor seeking a specific performance of a contract to purchase is dismissed on account of some defect in his title, the doors of courts of equity are, and ought to be, forever closed upon him, though he may afterward be able to make a good title. If the court intended to grant the complainant further time, it should have continued the cause, and thereby given him an opportunity to complete his title, or should have dismissed the bill without prejudice. In case it dismisses the bill generally, the right of the vendor to compel a specific performance is thereby conclusively and *perpetually* negatived.[4] If the decree declares the bill to be dismissed without prejudice, it leaves the complainant free to prosecute another suit based upon the same cause.[5] A section of the law of the United States in relation to patents provides that where two patents interfere, any person interested may apply in equity, on notice to the adverse parties, and the court may *adjudge and declare* either of *the patents void*, in whole or in part, or

[1] Gist *v.* Davis, 2 Hill Ch. 335; 29 Am. Dec. 89; Emory *v.* Keighan, 88 Ill. 516; Gage *v.* Ewing, 114 Ill. 15. *Contra*, Smith *v.* Horusby, 70 Ga. 552.

[2] Curts *v.* Trustees of Bardstown, 6 J. J. Marsh. 536.

[3] Borrowscale *v.* Tuttle, 5 Allen, 377.

[4] Hepburn *v.* Dunlop, 1 Wheat. 179.

[5] Lang *v.* Waring, 25 Ala. 625; 60 Am. Dec. 533; Nevitt *v.* Bacon, 32 Miss. 212; 66 Am. Dec. 609; Magill *v.* Mercantile T. Co., 81 Ky. 129.

*inoperative and invalid* in any particular part of the United States.[1] The effect of a decree entered, generally dismissing a bill brought before the court under this act, is not equivalent to a judicial declaration that the patent of the complainant is either inoperative or void. In announcing this conclusion, the court, after suggesting that the dismissal may have been ordered because the plaintiff did not show that defendant violated his rights, or because the defendant may have shown a license from the plaintiff, said: "A judgment or decree under this statute cannot be accepted as determining that point, unless it be direct and affirmative in terms, and in the words of the statute. The court must *adjudge* the patent *void* in whole or in part, or inoperative and invalid in some particular part of the United States. Had the decree asserted the interference of the patents, and declared either of them void, that decree would have been conclusive.[2]

§ 270 a. **A Bill may be Dismissed before the Hearing,** on the motion of the plaintiff, upon payment of costs.[3] Such a dismissal has no higher effect as *res judicata* than the voluntary dismissal of an action at law.[4] This rule was applied where the cause had been set down for hearing, but before the testimony was published the complainant dismissed his bill.[5] In a case before Chancellor Kent, the decree relied upon as a bar was one dismissing a former bill, because no one appeared on the part of the complainant at the hearing. The chancellor said: "The merits of the former cause were never discussed, and no opinion of the court has ever been expressed upon them. It is, therefore, not a case within the rule rendering a decree a bar to a new suit. The ground of this defense

[1] Patent Act, 1836, sec. 16; 5 U. S. Stats. at Large, 123.

[2] Tyler *v.* Hyde, 2 Blatchf. 308.

[3] Cummins *v.* Bennett, 8 Paige, 79; Simpson *v.* Brewster, 9 Paige, 245; Carrington *v.* Holly, 1 Dick. 280; Curtis *v.* Lloyd, 4 Mylne & C. 194; Lock *v.* Nash, 2 Madd. 389; White *v.* Westmeath, 1 Beat. 174; Knox *v.* Brown, 2 Brown Ch. 185.

[4] Walden *v.* Bodley, 14 Pet. 160; Conn. *v.* Penn., 5 Wheat. 427; Badger *v.* Badger, 1 Cliff. 241; Butchers' S. & M. Ass'n *v.* Boston, 137 Mass. 185; Jourolmon *v.* Massengill, 86 Tenn. 81.

[5] Badger *v.* Badger, 1 Cliff. 241.

by plea is, that the matter has already been decided, and there has been no decision of the matter."[1] But this decision has since been overruled, on the ground "that as the bill was dismissed after publication had passed, it was the same thing, in legal effect, as though the cause had been brought to a hearing on the pleading and proofs."[2] The opinion of the chancellor thus overruled was doubtless correct, and is supported by the weight of authority.[3] If the defendant at any time procures the dismissal of the bill for want of prosecution, this is not a judgment on the merits, and therefore not *res judicata*.[4] In fact, the better opinion is, that a decree dismissing a bill is conclusive only when it is, or from the language in which it is expressed or the circumstances of its entry must be presumed to be, on the merits. After the cause has been set down for final hearing it has been held that the complainant has no power to dismiss it, and that his voluntary dismissal is equivalent to a judgment on the merits, unless the chancellor orders it to be without prejudice;[5] but this is not universally conceded. In some of the states it has no greater force as *res judicata* than a judgment of discontinuance at law.[6] If the bill is defective, and a demurrer is sustained thereto, and final decree entered therein, this will not preclude complainant from recovering upon a subsequent and sufficient bill.[7]

§ 271. **Immaterial Findings.** — The effect of every judgment or decree as an estoppel is restricted to such matters as might have been litigated under the pleadings.[8] Thus if plaintiff, in an action in relation to real estate, avers no title beyond his own life, the judgment rendered

[1] Rosse *v.* Rust, 4 Johns. Ch. 300.

[2] Ogsbury *v.* La Farge, 2 N. Y. 114; citing Byrne *v.* Frere, 2 Molloy, 157.

[3] Baird *v.* Bardwell, 60 Miss. 164; Loudenback *v.* Collins, 4 Ohio St. 251; Porter *v.* Vaughn, 26 Vt. 624; Curtis *v.* Lloyd, 4 Mylne & C. 194.

[4] Baird *v.* Bardwell, 60 Miss. 164; Loudenback *v.* Collins, 4 Ohio St. 251; Porter *v.* Vaughn, 26 Vt. 624; Curtis *v.* Lloyd, 4 Mylne & C. 194.

[5] Edgar *v.* Buck, 65 Mich. 356; Phillips *v.* Wormley, 58 Miss. 398.

[6] Kempton *v.* Burgess, 136 Mass. 192.

[7] Gage *v.* Ewing, 114 Il . 15; Emory *v.* Keighan, 88 Ill. 516.

[8] Town *v.* Lamphere, 34 Vt. 365; Duncan *v.* Holcomb, 26 Ind. 378; Burdick *v.* Post, 12 Barb. 168.

in his favor is not conclusive as to any *greater* title than he put in issue.[1] The agreement of the litigants that matters not in issue may be given in evidence, and may be determined by the verdict of the jury, will not enlarge the effect of the judgment as an estoppel.[2] Nor can evidence be admitted "to show a prior or contemporaneous parol agreement between the parties, the effect of which would be to materially vary the terms of the decree and change the rights of the parties thereunder." A divorced husband cannot, in a proceeding by his former wife to obtain an allowance for the support of their child, show that the decree of divorce was entered in pursuance of a parol agreement, by the terms of which she was to provide for the child.[3]

The rule that no judgment or decree is conclusive of anything not required to support it is not a mere rule of construction employed in giving effect to an adjudication, where the record fails to disclose what findings were made. It is an unyielding restriction of the powers of the parties, of the court, and of the jury. If the language of a decree is general, it will be restrained to the issues made in the case, and to the subject-matter under consideration by the court.[4] But if "a decree, in express terms, purports to affirm a particular fact or rule of law, yet if such fact or rule of law was immaterial to the issue, and the controversy did not turn upon it, the decree will not conclude the parties in reference thereto."[5] The declaration, in a decree, of the character of the title of one of the parties, when the consideration of such character is foreign to the case and unnecessary to its disposition, has no force upon the parties or privies, nor upon any one else, as an adjudication of title.[6] A special finding of a

[1] Bradford *v.* Bradford, 5 Conn. 127.

[2] Campbell *v.* Consalus, 25 N. Y. 613; Wolfe *v.* Washburn, 6 Cow. 262; Guest *v.* Warner, 9 Ex. 379.

[3] Wilson *v.* Wilson, 45 Cal. 399.

[4] Bonvillain *v.* Bourg, 16 La. Ann. 363.

[5] Woodgate *v.* Fleet, 44 N. Y. 1; People *v.* Johnson, 38 N. Y. 63; 5 Trans. App. 299; 97 Am. Dec. 770; Hotchkiss *v.* Nichols, 3 Day, 138; Coit *v.* Tracy, 8 Conn. 268; 20 Am. Dec. 110.

[6] Fulton *v.* Hanlow, 20 Cal. 450.

court or a verdict of a jury not confirmed by any judgment of the court, nor involved in any general verdict, cannot be relied upon on a trial before another or the same jury, in the same or another suit, as proof of the facts so found. It is only when such special finding has become the basis of a judgment that the matters affirmed or denied by it are *res adjudicata*.[1] No record is conclusive as to the truth of any immaterial allegations contained in the pleadings. Thus in an action of debt on a bond, it may be shown that the bond was made at A, though in a former suit it was described as being made at B. A conviction for felony, upon a general verdict, is never conclusive that the offense was committed on the day named in the indictment; for time was not of the essence of the offense. And this rule will hold good in relation to all facts stated in the pleadings of either party, whether denied or admitted by his adversary, if the existence or non-existence of those facts could have no effect upon the final determination of the rights of the parties.[2] The New York court of appeals has, however, recently determined that the acceptance of a judgment by confession for certain goods "as sold and delivered" by plaintiff to the defendant is conclusive against the former in an action against the husband of the former defendant for the conversion of the same goods.[3]

PART III. — OF EVIDENCE TO ESTABLISH OR REBUT THE PRESUMPTION OF RES JUDICATA.

§ 272. **Whether Matter in Issue can be Shown to have been Omitted.** — We have shown that the rule excluding from the conclusive effect of a final adjudication all of those matters which were not material to the decision of the controversy made by the pleadings is an *inflexible* rule.

[1] Hawks *v.* Truesdell, 99 Mass. 557; Yeates *v.* Briggs, 95 Ill. 79; Bayliss *v.* Deford, 73 Iowa, 495; Wilson *v.* Stripe, 4 G. Greene, 551; 61 Am. Dec. 138; Auld *v.* Smith, 23 Kan. 65; Mitchell *v.* Insley, 33 Kan. 654; Woolsey *v.* Bohn, 41 Minn. 235; Lorillard *v.* Clyde, 99 N. Y. 196.

[2] 2 Phillipps's Evidence, 4th Am. ed., 2.

[3] Field *v.* Bland, 21 Alb. L. J. 511.

It seems that there ought to be a rule the converse of this, and equally inflexible, to the effect that there shall be *included* in the conclusive effect of every final adjudication every matter *material* to the disposition of the controversy *as made by the pleadings*, when the cause is submitted for decision; and such, probably, is the generally recognized rule at the present day. But it is opposed by decisions which permit either the plaintiff or the defendant, in certain cases, to show that a matter asserted as a claim or as a defense by his pleading was not attempted to be asserted by him at the trial. Thus it has been said that "if a party attempt, on the trial of his action, to prove a demand against the defendant, and fail, he cannot set it up again on a second action; but if he can clearly show that he omitted to give any evidence of his demand in the action, he is not concluded from doing so afterward."[1] In the case from which this quotation is made, a plaintiff, having two demands, clearly distinct, sued upon both, and obtained a default. In executing the writ of inquiry, he gave evidence upon but one of his demands, and recovered judgment accordingly. In rendering a decision permitting a second action to be maintained for the demand not allowed in the first, Lord Kenyon said: "In truth, this is a question of great delicacy. We must take care not to tempt persons to try experiments in one action, and when they fail, to suffer them to bring other actions for the same demand. The plaintiff who brings a second action ought not to leave it to nice investigation to see whether the two causes of action are the same. He ought to show, beyond all controversy, that the second is a different cause of action from the first, in which he failed. In this case it is clearly shown that this demand was not inquired into in the former action."[2] "But if plaintiff, having several causes

[1] Seddon *v.* Tutop, 6 Term Rep. 607; Thorpe *v.* Cooper, 5 Bing. 116; Deacon *v.* Great Western R'y Co., 6 U. C. C. P. 241; Hadley *v.* Green, 2 Tyrw. 390.

[2] Seddon *v.* Tutop, 6 Term Rep. 607; Newell *v.* Carpenter, 118 Mass. 411.

of action against the defendant, on the trial offers evidence on these causes, and fails for want of sufficient evidence to sustain some of them, he cannot bring another action for those causes of action on which he failed. Where the plaintiff fails to recover all that he is entitled to for want of some proof on the first trial, he should move to set aside the verdict that he has obtained."[1] But so far as the plaintiff is concerned, most of the American cases go further. They declare that he will not be allowed to bring another action, because in the first he gave no evidence of his demand;[2] that he will not be permitted to reserve, or from any cause not to produce, part of his evidence; and that the judgment will be conclusive as to every matter which he could have proved in the first suit, and which was not proved nor withdrawn.[3] The defendant, however, although his pleadings present a claim, need not give evidence in its support, unless it is one which he is compelled to present and litigate in that action. Thus where a defendant, sued for the price of a horse, set up as a defense a breach of warranty of soundness of the horse, and failed to appear at the trial, and judgment was rendered against him, he was allowed afterward to recover of the plaintiff for the same breach of warranty, because this was an affirmative cause of action which defendant had a right to litigate as a plaintiff. In cases like this, the question whether the claim was presented and submitted as a defense may be settled by proof at the trial of the second action. But if the claim is specifically embraced in the pleadings, the presumption is, that it was presented at the trial, and considered in the rendition of the judgment.[4] If a court *erroneously* rejects evidence, offered to prove a claim or defense, on the ground that it is inadmissible, such claim,

[1] Stafford *v.* Clark, 2 Bing. 377; Brockway *v.* Kinney, 2 Johns. 210; McGuinty *v.* Herrick, 5 Wend. 240.

[2] Ramsey *v.* Herndon, 1 McLean, 450.

[3] Baker *v.* Rand, 13 Barb. 152; Fisk *v.* Miller, 20 Tex. 579; Tate's Ex'r *v.* Hunter, 3 Strob. Eq. 136; Barrett *v.* Failing, 8 Or. 152.

[4] Burwell *v.* Knight, 51 Barb. 267; McDaniel *v.* Fox, 77 Ill. 343.

nevertheless, on rendition of the judgment, becomes *res judicata*, and so remains until the judgment is vacated or reversed by some appropriate proceeding.[1] If such evidence was offered to establish a cause of action stated in a particular count of the plaintiff's declaration, and the plaintiff, failing to strike out or withdraw that count, suffers a general verdict on the whole cause, the judgment will be a bar to another action on the claim so attempted to be established.[2]

A judgment of a court possessing competent jurisdiction is final, not only in reference to the matters actually or formally litigated, but as to all other matters which the parties might have litigated and had decided in the cause.[3] A party cannot try his action in parts. The judgment is conclusive, not only of the matters contested, but as to every other thing within the knowledge of the complainant which might have been set up as a ground for relief in the first suit.[4] If the determination of a question is necessarily involved in the judgment, it is immaterial whether it was actually litigated or not.[5] Where in fact items of an account were specifically set forth in the statement of the causes of action in a former suit, and, though known to exist, were for some reason overlooked and not considered, they cannot in law be the ground of a second action,[6] nor can they be made the ground of such action, though they were omitted, owing to an error of the justice before whom the case was tried, in rendering his judgment.[7] The omission of a court to award relief prayed for is an adjudication, in effect, that the complainant is not entitled thereto.[8] Hence if, in an action on a note and mortgage, judgment is rendered on the note, without

[1] Beall *v.* Pearre, 12 Md. 555; Burnett *v.* Smith, 4 Gray, 50; Grant *v.* Button, 14 Johns. 377.

[2] Smith *v.* Whiting, 11 Mass. 445.

[3] Bellinger *v.* Craigue, 31 Barb. 534; Davis *v.* Tallcott, 12 N. Y. 184; Marriott *v.* Hampton, 7 Term Rep. 265; Bruen *v.* Hone, 2 Barb. 596.

[4] Hamilton *v.* Quimby, 46 Ill. 90; Shaffer *v.* Scuddy, 14 La. Ann. 575.

[5] Barker *v.* Cleveland, 19 Mich. 230.

[6] Keokuk *v.* Alexander, 21 Iowa, 377.

[7] Town *v.* Smith, 14 Mich. 348.

[8] Thompson *v.* McKay, 41 Cal. 221.

any order of sale, this is conclusive that the plaintiff has no lien, and he cannot afterward maintain an action to foreclose his mortgage.[1] From the decisions cited in this section, the conclusion is irresistible that a judgment or decree is conclusive upon all causes of actions and all matters of defense presented by the pleadings and not withdrawn before or during the trial, except, — 1. Where the plaintiff claims upon several and distinct causes of action, in which case he may, according to some of the authorities, maintain a second action upon any one of those causes upon which he can show that he offered no evidence at the trial of the former case;[2] 2. Where the defendant pleads a matter as a defense which he might have successfully employed as a cause of action against the plaintiff; in which case it appears that the right to such cause of action is not lost to the defendant, unless he followed up his pleading by offering evidence upon it in the former suit. With the possible exceptions here stated, a judgment is conclusive upon all the material issues made by the pleadings, and also upon every material allegation, whether of claim or of defense, which the party against whom such allegation is made does not choose to controvert.

§ 273. **Evidence to Show What was Decided.** — A few early cases proceeded upon the theory that a former judgment would be received as evidence in a second action only as to those matters which, from an *inspection of the*

[1] Johnson *v.* Murphy, 17 Tex. 216.

[2] 2 Smith's Lead. Cas. 669. In this first class may be included those cases in which several counts are inserted in a declaration, and the general issue being pleaded, a general judgment is entered thereon. Such judgment is *prima facie* evidence of the prior adjudication of every demand which might have been litigated under the pleadings; but this evidence may be overcome by proving that some particular claim was neither presented nor considered: Wood *v.* Corl, 4 Met. 203; Southside R. R. Co. *v.* Daniels, 20 Gratt. 366; Allebaugh *v.* Coakley, 75 Va. 628; Parks *v.* Moore, 13 Vt. 183; 37 Am. Dec. 589; Cunningham *v.* Foster, 49 Me. 68; Merchants' Bank *v.* Schulenberg, 48 Mich. 102; Paine *v.* Schenectady I. Co., 12 R. I. 440; Converse *v.* Colton, 49 Pa. St. 346; Hungerford's Appeal, 41 Conn. 322; Dickinson *v.* Hayes, 31 Conn. 423; Sweet *v.* Maupin, 65 Mo. 65.

*record*, could be shown to have been settled in the first.[1] But it happens frequently, and perhaps in a majority of cases, that the matters litigated between the parties to an action cannot be ascertained from the record. It is now generally, and perhaps universally, conceded that parol evidence may be received for the purpose of showing whether a question was determined in a former suit;[2] and that "the estoppel extends, beyond what appears on the face of the judgment, to every allegation which, having been made on one side and denied on the other, was at issue and determined in the course of the proceedings; and that while there exists a strong presumption that the judgment covers every matter in the issues and apparently settled by the judgment, yet that this presumption may be overcome by clear proof that no evidence was given as to that fact by the plaintiff, or that defendant failed to take advantage of some defense which he might have made available."[3] It may always be shown by evidence *aliunde* that any matter which the issue was broad enough to cover arose and was determined in the prior suit.[4] The record may be first put in evidence, and then it may be followed by such parol evidence as may be necessary to give it proper effect.[5] If the record in an action of ejectment does not show on what grounds the

[1] Smith *v.* Sherwood, 4 Conn. 276; 10 Am. Dec. 143; Church *v.* Leavenworth, 4 Day, 281; 1 Esp. 43; Manny *v.* Harris, 2 Johns. 29; 3 Am. Dec. 386.

[2] Taylor *v.* Dustin, 43 N. H. 493; King *v.* Chase, 15 N. H. 9; 41 Am. Dec. 675; Foster *v.* Wells, 4 Tex. 101; Walker *v.* Chase, 53 Me. 258; Wood *v.* Jackson, 8 Wend. 9; 22 Am. Dec. 603; Teal *v.* Terrell, 48 Tex. 491; Estill *v.* Taul, 2 Yerg. 466; 24 Am. Dec. 498; Young *v.* Black, 7 Cranch, 565; Driscoll *v.* Damp, 16 Wis. 106; Davis *v.* Brown, 94 U. S. 423; Vallandingham *v.* Ryan, 17 Ill. 25; Russell *v.* Place, 94 U. S. 606; Hill *v.* Freeman, 7 Ga. 211; State *v.* Morton, 18 Mo. 53; Brown *v.* King, 10 Mo. 56; Amsden *v.* Dubuque etc. R. R. Co., 32 Iowa, 288; Gates *v.* Bennett, 33 Ark. 475; Sanderson *v.* Peabody, 5 N. H. 116; Haller *v.* Pine, 8 Blackf. 175; 44 Am. Dec. 762; Bridge *v.* Gray, 14 Pick. 55; 25 Am. Dec. 358; Strauss *v.* Meertief, 64 Ala. 299; 38 Am. Rep. 8; Wilson *v.* Dean, 121 U. S. 525; Fendall *v.* United States, 14 Ct. of Cl. 247; Foye *v.* Patch, 132 Mass. 105; White *v.* Chase, 128 Mass. 158.

[3] Clemens *v.* Clemens, 37 N. Y. 59.

[4] Chamberlain *v.* Gaillard, 26 Ala. 504; Dunckel *v.* Wiles, 11 N. Y. 420; Harris *v.* Harris, 36 Barb. 88; Lawrence *v.* Hunt, 10 Wend. 80; 25 Am. Dec. 539; Gardner *v.* Buckbee, 3 Cow. 120; 15 Am. Dec. 256; Eastman *v.* Cooper, 15 Pick. 276; 26 Am. Dec. 600.

[5] Briggs *v.* Wells, 12 Barb. 567.

plaintiff or defendant recovered, it may be explained by showing what title was established or set up in the action.[1] And for the purpose of ascertaining what was determined in a former action, the opinion of the court[2] and the briefs of counsel[3] may be considered. Judgment on the merits against the master, in an action of trespass for the act of his servant, is a bar to an action against the servant for the same act, though such judgment was not rendered until after the general issue was pleaded to the action against the servant; and parol evidence is admissible to show that the same matter is in controversy in both actions.[4] An entry of "dismissed at costs of plaintiff, being susceptible of a double construction, i. e., that it was a judgment for defendant on the merits, or a judgment of nonsuit or discontinuance, may be explained by evidence of the justice to show which character of judgment he intended to enter."[5] "When a number of issues are presented, the finding in any one of which will warrant the verdict and judgment, it is competent to show that the finding was upon one rather than on another of these different issues. Nor does the subsequent application of the verdict to a single count by the court preclude this inquiry." In order to show by evidence *aliunde* that a matter is *res judicata*, it must appear, not only that it was properly in issue in the former trial, but also that the verdict and judgment necessarily involved its determination.[6]

§ 274. **Evidence to Rebut Apparent Estoppel.** — If it appears *prima facie* that a question has been adjudicated, it may be proved by parol testimony that such question was not in fact decided in the former suit.[7] Where items

[1] Emery *v.* Fowler, 39 Me. 326; 63 Am. Dec. 627.

[2] Legrand *v.* Rixey, 83 Va. 862; New Orleans etc. R. R. Co. *v.* New Orleans, 14 Fed. Rep. 373; Serong *v.* Grant, 2 Mackey, 218.

[3] Greenlee *v.* Lowing, 35 Mich. 63.

[4] Carr *v.* Woodleff, 6 Jones, 400.

[5] W. A. & G. S. P. Co. *v.* Sickles, 24 How. 333.

[6] Packet Co. *v.* Sickles, 5 Wall. 580.

[7] Johnson *v.* Smith, 15 East, 213; Whittemore *v.* Whittemore, 2 N. H. 26; Parker *v.* Thompson, 3 Pick. 429; Phillips *v.* Berick, 16 Johns. 136; 8 Am. Dec. 299; Wheeler *v.* Van Houten, 12 Johns. 311; Coleman's Appeal, 62 Pa. St. 252; Southside R. R. Co. *v.* Daniel, 20 Gratt. 363; Spradling *v.* Conway, 51 Mo. 51; Bottorff *v.* Wise, 53 Ind. 32.

could have been proved in a former action, the presumption arises that they were proved, but it may be rebutted *aliunde*.[1] If a matter was pleaded as a credit, it is competent to show that it was not offered as a credit on the trial, and that the court in deciding the case expressly excluded it from consideration.[2] Parol evidence is also admissible, according to some decisions, to prove that a former action in a justice's court was not tried on the merits, but was nonsuited.[3] In an action for goods sold, the plaintiff, to avoid the plea of *res judicata*, may show that the previous judgment against him was rendered on the ground that the time of credit given on the goods had not expired.[4] If the defendant in a real action pleads a former recovery as a bar, the plaintiff may prove that he failed in his suit on the sole ground that his grantor was disseised at the time of conveying title; and the plaintiff may thereupon establish his title under a subsequent conveyance from such grantor.[5] Where the subject-matter has "been in litigation before, the evidence that the merits were not passed upon ought to exclude all other hypotheses,"[6] but when the evidence clearly shows that a former judgment was not on the merits, its force as *res judicata* is destroyed.[7]

§ 275. **Record not to be Impugned.** — It is important that the evidence offered to explain a record should not contradict it. For it cannot be shown, in opposition to the record, that a question which appears by it to have been settled was not in fact decided,[8] nor that, while a special cause of action was in issue, a different matter was

[1] Badger *v.* Titcomb, 15 Pick. 416; 26 Am. Dec. 611; Webster *v.* Lee, 5 Mass. 334; Golightly *v.* Jellicoe, 4 Term Rep. 147; Seddon *v.* Tutop, 6 Term Rep. 607.

[2] Smith *v.* Talbot, 11 Ark. 666.

[3] Elston *v.* Bratton, 13 Tex. 30.

[4] Wilcox *v.* Lee, 1 Rob. (N. Y.) 355.

[5] Perkins *v.* Parker, 10 Allen, 22.

[6] Baxter *v.* Aubrey, 41 Mich. 13.

[7] Wood *v.* Faut, 55 Mich. 185.

[8] Fisk *v.* Miller, 20 Tex. 579; Graves *v.* White, 13 Tex. 123; Fox *v.* Hudson, 20 Kan. 246; Armstrong *v.* St. Louis, 69 Mo. 309; 33 Am. Rep. 499; Long *v.* Webb, 24 Minn. 380; Underwood *v.* French, 6 Or. 66; 25 Am. Rep. 500; Barthe *v.* Denis, 133 U. S. 515; Lorillard *v.* Clyde, 122 N. Y. 41; 19 Am. St. Rep. 470; Davidson *v.* New Orleans, 32 La. Ann. 1424; Jones *v.* Perkins, 54 Me. 393; Butler *v.* Suffolk Glass Co., 126 Mass. 512.

in truth litigated.[1] In other words, where it appears by the record that a particular issue was determined, all question of fact is excluded, and the court must, as a matter of law, declare such determination to exist and to be conclusive.[2] In New York, because the proceedings in justices' courts are informal, it is said that the rule excluding from the effect of a former judgment matters not apparently within the issues is not always applicable, and that it may be shown that matters were received in evidence and adjudicated which were not within the issues.[3] Parol proof can be given to show the grounds of a judgment only when such grounds do not appear from the record itself. In no case can any matter be alleged or proved to have been passed upon, except it be such as might have been given in evidence, legitimately, under the issue joined.[4] Where a complaint is free from ambiguity, it cannot be shown that the judgment given thereon was for damages occasioned by injuries to land not a part of the premises described in the complaint.[5] A provision of a statute provided that whenever a sheriff failed to make money on an execution by the first day of the term before which it was returnable, the plaintiff might suggest that the failure was attributable to want of diligence, and that upon such suggestion the court should cause an issue to be made to try the fact. In an action upon a sheriff's bond for not making money on an execution, the defendants pleaded that an issue made under this statute had been found in their favor. Plaintiffs replied that the matters, neglects, and defaults complained of were not the same identical ones in respect to which defendants recovered their judgment. It was held that the matters sought to be put in issue in the replication

[1] Campbell *v.* Butts, 3 N. Y. 173; Campbell *v.* Consalus, 25 N. Y. 616; Standish *v.* Parker, 2 Pick. 20; 13 Am. Dec. 393.

[2] Bitzer *v.* Killinger, 46 Pa. St. 44; Coulter *v.* Price, 13 Lea, 451; Finley *v.* Hanbest, 30 Pa. St. 190.

[3] McLean *v.* Hungarin, 13 Johns. 184; King *v.* Fuller, 3 Caines, 152; Wilder *v.* Case, 16 Wend. 583.

[4] Briggs *v.* Wells, 12 Barb. 567.

[5] Gay *v.* Wells, 7 Pick. 219.

were necessarily involved in the former trial, and that to uphold the replication would be to permit a second litigation of the same questions; that the facts in issue in the suit appear by necessary intendment to be the facts involved in the proceeding under the statute; and that to say they were not so involved is to contradict the record itself.[1] When the subject-matter of the present and the former action is not the same, the principles stated in this section may, in some instances, seem inapplicable. Thus if after an action has been prosecuted to final judgment on a bond or note resulting in a recovery by the plaintiff, the defendant can never, in another action involving the same note, be permitted to show that he had a good defense thereto, which he failed to present for the consideration of the court in the first action, and thereby preserved it from the operation of the judgment; in other words, he cannot show that the matter of his defense has not become *res judicata*, for to do so would clearly contradict the record. But if the defendant were to be sued upon another note or bond of the same series, and to which he in fact had no other defenses than those which existed against the former note or bond, he may show that some valid defense existing against both was not presented and litigated in the former action, and may avail himself of such defense in the present case, though forever barred from using it against the recovery in the prior action.[2]

§ 276. **Onus of Proof.** — There are two classes of cases in which evidence *aliunde* is admissible for the purpose of showing what matters are *res judicata*, viz.: 1. All those cases in which from the record alone no intimation is given whether a particular matter has been determined or not; 2. All those cases in which from the record it appears that a particular question was probably determined.

[1] Chapman *v.* Smith, 16 How. 114.

[2] Cromwell *v.* County of Sac, 94 U. S. 351; Davis *v.* Brown, 94 U. S. 423; Russell *v.* Place, 94 U. S. 606.

As a general rule, the *onus* of establishing an estoppel is by the law cast upon him who invokes it.[1] Under this rule there can be no doubt that in all cases coming under the first class it is incumbent upon a party alleging that a question has been settled by a former adjudication to support his allegation by evidence *aliunde*.[2] But in relation to cases of the second class, there appears to be a radical difference of opinion. On the one side it is claimed that "where the declaration in the second action is framed in such a manner that the causes of action may be the same as those in the first suit, it is incumbent upon the party bringing the second action to show that they are not the same."[3] "A party who brings a second action must not leave it to nice investigation to see whether the two causes are the same. He ought to show beyond doubt that the second is a different cause of action from the first, in which he failed."[4] In cases where several issues are made by the pleadings, and evidence is given upon all those issues, and a general verdict is obtained, the question arises as to which of the issues this verdict is conclusive. In Vermont, Oregon, Pennsylvania, and Indiana the presumption is, that it is conclusive that *all the issues* were found in favor of the prevailing party. Whoever denies this must rebut that presumption, if he can, by showing that the finding and judgment were upon a particular issue.[5] In Massachusetts it is settled by a number of decisions that a general verdict in favor of a party presenting several claims or defenses is not of itself *prima facie* conclusive upon any of those claims or defenses. Thus in an action for breaking several covenants in a

[1] Cummings *v.* Colgrove, 25 Pa. St. 150; Bennett *v.* Holmes, 1 Dev. & B. 486; Strother *v.* Butler, 17 Ala. 733; Doty *v.* Brown, 4 N. Y. 71; 53 Am. Dec. 350; Davis *v.* Talcott, 14 Barb. 611; Smalley *v.* Edey, 19 Ill. 207; Van Valkenburg *v.* Milwaukee, 43 Wis. 574.

[2] Pruitt *v.* Holly, 73 Ala. 369; Hanchey *v.* Croskery, 81 Ala. 149; Morgan *v.* Burr, 58 N. H. 470.

[3] Lord Bagot *v.* Williams, 3 Barn. & C. 235.

[4] Agnew *v.* McElroy, 10 Smedes & M. 552; 48 Am. Dec. 772; Baxter *v.* Aubrey, 41 Mich. 13.

[5] Hall *v.* Zeller, 17 Or. 381; White *v.* Simonds, 33 Vt. 178; 78 Am. Dec. 620; Rockwell *v.* Langley, 19 Pa. St. 502; Day *v.* Vallette, 25 Ind. 42; 87 Am. Dec. 353.

lease, the plaintiff recovered a general verdict for nominal damages. In a subsequent action, the record in the former action was held not to show, of itself, that the breach in question was *res judicata*. The cause was remanded for further proceedings, in which it was shown, by evidence *aliunde*, that the breach involved in the second action was one of the questions litigated in the former suit, and on which evidence was offered at the trial. With this proof to support it, the former judgment was considered a bar.[1] According to some of the most recent and authoritative adjudications upon this subject, "if there be any uncertainty in the record, as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which judgment was rendered, the whole subject-matter of the action will be at large and open to a new contention, unless the uncertainty be removed by extrinsic evidence showing the precise point involved and determined."[2] In an action where plaintiff sought to recover from defendant for board of the latter's wife, and at the trial relied on two grounds, viz.: 1. That she was absent from her husband by his consent; 2. That she was justifiably absent from him on account of his cruelty to her, — a judgment was rendered for plaintiff. This judgment was held to establish against defendant that his wife was justifiably absent, and to leave the jury to judge from the judgment, and from such other evidence as came before them, whether the ground of the former recovery was absence by consent or absence on account of cruelty.[3] In the same state a decree dismissing a bill was insisted upon as a bar. It appeared from the record that some temporary defenses were relied upon in the former suit, but that the bill was dismissed without specifying any reasons, and without any restriction upon its effect. It

[1] Sawyer *v.* Woodbury, 7 Gray, 499; 66 Am. Dec. 588.

[2] Russell *v.* Place, 94 U. S. 606; Chrisman's Adm'r *v.* Harman, 29 Gratt. 494; 26 Am. Rep. 387; Lewis *v.* Ocean etc. Co., 125 N. Y. 341; Bell *v.* Merrifield, 109 N. Y. 202; 4 Am. St. Rep. 436.

[3] Burlen *v.* Shannon, 14 Gray, 433.

was decided not to be conclusive on the merits. In announcing this decision, the court said: "To be a bar to future proceedings, it must appear that the former judgment necessarily involved the determination of the same fact, to prove or disprove which it is offered in evidence. It is not enough that the question was in issue in the former suit; it must also appear to be precisely determined. Where in the answer various matters of defense are set forth, some of which relate to the maintenance of the suit, and others to the merits, and there is a general decree of bill dismissed, it is impossible to hold the decree a bar to future proceedings."[1] In Kentucky, if the record of a former judgment is not shown, it will be presumed to have been entered on the merits.[2] If relief in equity is sought upon several grounds, and the bill is dismissed, this is necessarily a decision against all of them.[3] So, generally, if two or more causes of action are united, a judgment in favor of plaintiff for one only is conclusive against him as to the other;[4] and if a judgment may be rested upon either of two grounds, and the court in fact decides both of them, then the judgment is conclusive respecting both.[5]

§ 276 a. **Where there are Several Defenses**, any one of which is sufficient to defeat the action, and the court or jury finds specially in favor of the defendant upon all of them, each becomes *res judicata*, and the judgment is upon the merits, although some of the defenses are in the nature of pleas in abatement, and go only to defeat the present action.[6] If a bill in equity is demurred to upon several distinct grounds, and on this demurrer a general decree is entered of bill dismissed, this is a judgment upon the

[1] Foster *v.* The Richard Busteed, 100 Mass. 409; 1 Am. Rep. 425; Burlen *v.* Shannon, 99 Mass. 200; 96 Am. Dec. 733.

[2] National Bank *v.* Bryant, 13 Bush, 419.

[3] Attorney-General *v.* Chicago etc. R. R. Co., 112 Ill. 520.

[4] Bassett *v.* Conn. R. R. Co., 150 Mass. 178; Hoyle *v.* Farquharson, 80 Mo. 377.

[5] Hawes *v.* Contra Costa W. Co., 5 Saw. 287; Florida etc. R'y Co. *v.* Schutt, 103 U. S. 118.

[6] The 420 Mining Co. *v.* Bullion Min. Co., 3 Saw. 634; Hawes *v.* C. C. W. Co., 5 Saw. 287; 7 Reporter, 100; Sheldon *v.* Edwards, 35 N. Y. 286.

merits, though some of the grounds of demurrer did not involve the merits of the suit.[1] If several defenses are presented, some of which in point of law are good and others bad, and defendant has judgment, it will not be presumed that the court decided erroneously and gave judgment in his favor on the insufficient defense. That defense, therefore, is not affected by the judgment.[2]

PART IV. — MATTERS WHICH NEED NOT BE LITIGATED.

§ 277. **Set-off not Presented.** — It has already been stated that the defendant is not barred by judgment of any matter of defense which he was not bound to present to the court or jury, and on which he offered no evidence at the trial. The statutes of set-off are for the benefit of defendants, and plaintiffs cannot compel defendants to avail themselves of those benefits. It is well understood that, unless some state statute provides otherwise, the defendant may waive his set-off or counterclaim in an action against him, and thereafter litigate it in an action instituted by himself.[3] By the Code of Civil Procedure of California, if the counterclaim arises "out of the transaction set forth in the complaint as the foundation of the plaintiff's claim," or is "connected with the subject of the action," and the suit is in any other than a justice's court, the defendant, by omitting to set up such counterclaim, waives all right to subsequently employ it as a cause of action.[4] But if the action is in a justice's court, then the defendant must present all facts "constituting a defense or counterclaim upon which an action might be brought by the defendant against the plaintiff in a justice's court"; and if he fails so to do, "neither he nor his assignee can afterward maintain an action against

[1] House *v.* Mullen, 22 Wall. 42.

[2] Lenton *v.* Crosby, 61 Iowa, 401.

[3] Waterman on Set-off, 631; Hobbs *v.* Duff, 23 Cal. 596; Robbins *v.* Harrison, 31 Ala. 160; Le Guen *v.* Gouverneur, 1 Johns. Cas. 501; 1 Am. Dec. 121; Robinson *v.* Wiley, Hemp. 38. *Contra*, see Crawford *v.* Simonton, 7 Port. 110; McEwen *v.* Bigelow, 40 Mich. 215; Emmerson *v.* Herriford, 8 Bush, 229; Fannin *v.* Thomasson, 45 Ga. 533; Weaver *v.* Brown, 87 Ala. 533; Axtel *v.* Chase, 83 Ind. 546; Savery *v.* Sypher, 39 Iowa, 675; Kezar *v.* Elkins, 52 Vt. 119.

[4] Code Civ. Proc., secs. 438, 439.

the plaintiff therefor."[1] In some states, while the right to waive a set-off or counterclaim and institute a suit upon it afterward is recognized, yet defendants are discouraged from so doing by a provision of the statute providing that in the subsequent action they shall not recover costs.[2] Sometimes, however, counterclaims are created by statute, and required to be presented in actions against the persons entitled to their benefit. Thus if persons in possession of property, on being sued therefor by the holders of paramount title, are entitled in such action to an allowance for improvements made or taxes paid, but fail to present their claims therein, they cannot subsequently assert such claims.[3] Though a matter is pleaded as a set-off or counterclaim, yet if it is for any reason not allowable as such in the action, and is excluded from evidence, and not taken into consideration in rendering judgment, an action may afterward be maintained thereon.[4] While all matters of defense are barred, the distinction between a matter of defense and a cross-claim must be constantly kept in view. A cross-claim, set-off, or matter of recoupment may be interposed by defendant, but he is not bound to do so. Thus though in an action for the price of goods sold defendant might give in evidence a breach of warranty of those goods, or of deceit in the sale, and so defeat the action in whole or in part, yet he is under no obligation to do so, and he may maintain his cross-action for the damages, after having submitted to a judgment for the price.[5] When part performance of a contract (e. g., to work for a year) forms the ground of an action, the defendant may suffer judgment, and afterward may sue and recover damages for a breach of the contract.[6] A sued B to recover the price of constructing

[1] Code Civ. Proc., secs. 855, 856.

[2] Ohio Code, 96, 119; Neb. Code, 102, 116.

[3] Raymond *v.* Ross, 40 Ohio St. 343.

[4] Haas *v.* Taylor, 80 Ala. 459; Crabtree *v.* Welles, 19 Ill. 55; Lancaster Mfg. Co. *v.* Colgate, 12 Ohio St. 344; Beebe *v.* Buell, 12 Wend. 504; 27 Am. Dec. 150; Fifield *v.* Edwards, 39 Mich. 264.

[5] Cook *v.* Moseley, 13 Wend. 277.

[6] Britton *v.* Turner, 6 N. H. 481; 26 Am. Dec. 713.

a kitchen range. The defendant paid into court a sum which plaintiff accepted as a full satisfaction. B then sued A for negligently performing the work, and was permitted to recover, on the ground that the recovery in the second action was not inconsistent with the work sued for in the first, being of some value.[1] If a matter available as a counterclaim is relied upon as a defense, and the decision is against it, it cannot afterward be asserted either as a counterclaim or cause of action.[2] But when it is allowed as a defense to the extent of preventing any recovery by plaintiff, the question may then arise whether it can be used as a counterclaim or cause of action for the purpose of supporting any further recovery. In Massachusetts a party who is sued and is entitled to urge a matter, either as a defense to an action or as a ground for a recovery in an independent action, must elect which he will do, and if he elects to interpose it as a defense merely, and obtains the benefit of it as such, cannot afterwards maintain a further action to recover damages, though such damages exceed the amount of the benefit involved in the former defense.[3]

§ 278. **Set-off not Decided.**—If the defendant sets up and claims a set-off, and the records shows that the court excluded all evidence in relation to the set-off, the judgment cannot be used as an estoppel in an action by the defendant for the same set-off,[4] because "although a court of law declines to determine a question of set-off, yet it is not *res judicata*, so as to preclude an inquiry in a court of equity."[5] And the same rule prevails where, instead of the court's excluding the evidence, the defendant failed to present any proof in support of his counterclaim.[6]

[1] Rigge *v.* Burbidge, 15 Mees. & W. 598.

[2] Patrick *v.* Shaffer, 94 N. Y. 423.

[3] O'Conner *v.* Varney, 10 Gray, 231; Bennett *v.* Gray, 4 Gray, 511; Sawyer *v.* Woodbury, 7 Gray, 499; 66 Am. Dec. 518. But see Osborne *v.* Williams, 39 Minn. 353.

[4] Hobbs *v.* Duff, 23 Cal. 596.

[5] Hackett *v.* Connett, 2 Edw. Ch. 73.

[6] Eastmure *v.* Laws, 7 Scott, 461; Reynolds *v.* Reynolds, 3 Ohio, 268; Janney *v.* Smith, 2 Cranch C. C. 499; Garrott *v.* Johnson, 11 Gill & J. 173; 35 Am. Dec. 272.

§ 279. **Set-off not Allowed.** — There is no doubt that if a set-off is presented by defendant in his pleadings, and attempted to be supported by evidence to the jury, it will, whether allowed or disallowed, become *res judicata*. It is settled by the judgment as conclusively, when it does not appear to have been allowed, as though there were an express finding against it.[1] When the set-off has been presented to the jury, and evidence offered to sustain it, the effect of the judgment afterward rendered cannot be changed in a subsequent action by showing that the jury did not in fact consider the set-off in making their verdict.[2] If a judgment is pleaded as a set-off when it is a proper matter of set-off, and is disallowed by the jury, it is extinguished, and can no longer be the basis of an action. If the plaintiff afterward issues execution upon it, he is a trespasser.[3] A claim presented as a set-off, and not allowed, will not be barred, except it was in such a condition as to have been barred if then offered as a cause of action in a suit by the defendant against the plaintiff. Thus if when offered it is not legally a set-off, because not yet due, it may, if not allowed, be employed as a cause of action or as a set-off in any subsequent suit between the same parties. If the defendant pleads matter which he might have made the basis of a suit, and on the trial cross-examines the plaintiff's witnesses in reference to the matters so pleaded in defense, he cannot avoid the effect of the judgment on the ground that he introduced no witnesses to testify on the subject, nor because the referee decided the case before the defendant was prepared with all his proofs.[4]

The language generally employed in treating of this

[1] Wright *v.* Salisbury, 46 Mo. 26; Nave *v.* Wilson, 33 Ind. 294; Howe *v.* Lewis, 121 Ind. 110; Stevens *v.* Miller, 13 Gray, 283; Worrell *v.* Smith, 6 Col. 141; Ruegger *v.* Indianapolis etc. R. R. Co., 113 Ill. 449. Nor is it material that the evidence to support a set-off was excluded because insufficient: Green *v.* Sanborn, 150 Mass. 454.

[2] Baker *v.* Stinchfield, 57 Me. 363.

[3] McGuinty *v.* Herrick, 5 Wend. 240. The same rule applies to matters of defense erroneously rejected: Collins *v.* Bennett, 46 N. Y. 490.

[4] Ehle *v.* Bingham, 7 Barb. 494.

subject is such as to indicate that, to conclude a claim of set-off, it must be presented to the jury, and some evidence given upon it. But it has been decided that a set-off not withdrawn becomes *res judicata*, though no evidence is given to support it, and the defendant was not prepared to give such evidence at the trial of the former case.[1] This seems to be a just and reasonable decision. There is as much propriety in requiring defendant either to litigate or withdraw his demands as there is in requiring the plaintiff to support or withdraw his alleged causes of action.

§ 280. **Voluntary Allowance of an Offset.** — A plaintiff cannot, in a suit against the defendant, compel the latter to present or litigate his counterclaim by giving him credit for any items of such claim and suing for the balance. Thus if A sue B upon an account in which he credits B with certain goods, B may suffer judgment by default, and may then sue A for the goods, if the credit was not their full value. The value of the goods is not fixed by the former judgment, because it was not directly in issue, and the defendant offered no evidence upon it. He is not bound to offer such evidence at his own expense, when he can, by commencing another action, offer it at the expense of his adversary.[2] But if the credits for goods were of their full value, this is a good defense to an action brought by the defendant against the plaintiff for the same goods.[3] If the plaintiff brings an action in which he credits defendant in certain sums, and claims an amount specified as a balance due, the defendant may come in and confess judgment for the amount sued for, and this will not prevent him from sustaining a subsequent action for demands due to him from the plaintiff, and not allowed by the latter in the first suit.[4]

[1] Eastmure *v.* Laws, 7 Dowl. 431.
[2] Minor *v.* Walter, 17 Mass. 237; 20 Am. Dec. 526. McEwen *v.* Bigelow, 40 Mich. 215.
[3] Briggs *v.* Richmond, 10 Pick. 392;
[4] Kauff *v.* Messner, 4 Brewst. 98.

§ 281. **Equitable Defenses.** — It follows from the rule that a matter cannot become *res judicata* until it can be tried upon the merits, that a failure at law does not affect a remedy or defense cognizable only in equity.[1] Whenever a "party has equitable rights not cognizable in a court of law which would in a court of equity have prevented such an adjudication as was made in the court of law, the judgment will interpose no obstacle to redress in equity, since the court of law had no proper jurisdiction of the subject-matter forming the basis of redress in equity."[2] Under the code of procedure as in force in New York and in California, matters formerly recognized only in equity may be interposed as defenses to actions at law. The question has arisen in both states whether it is incumbent on the defendant to present his equitable defense, or whether he may suffer judgment to be taken against him, and subsequently assert his claims in equity. The answer given to the question in the former state is, that, "as a general rule, the defendant who has an *equitable* defense to an action, being now authorized to interpose it by answer, is bound to do so, and shall not be permitted to bring a separate action merely for the purpose of restraining the prosecution of another action pending in the same court."[3] In California, however, the answer is in direct conflict with that given in New York. In an early case it was held that "although a party may set up an equitable defense to an action at law, his remedy is not confined to that proceeding. He may let the judgment go at law, and file his bill in equity for relief. Our practice, while it enlarges the field of remedy, does not take away pre-existing remedies by

[1] Mosby *v.* Wall, 23 Miss. 81; 55 Am. Dec. 71; White *v.* Crew, 16 Ga. 416; Arnold *v.* Grimes, 2 Clarke. 1; Pollack *v.* Gilbert, 16 Ga. 398; 60 Am. Dec. 732; McCurry *v.* Robinson, 23 Ga. 321; Worthington *v.* Curd, 22 Ark. 277; Nims *v.* Vaughn, 40 Mich. 356; Chicago etc. R. R. Co. *v.* Hay, 119 Ill. 439; Jenkins *v.* Harrison, 66 Ala. 345; Hawley *v.* Simons, 102 Ill. 115.

[2] Story's Eq. Jur., sec. 1573; Dunham *v.* Downer, 31 Vt. 249.

[3] Winfield *v.* Bacon, 24 Barb. 154; Foot *v.* Sprague, 12 How. Pr. 355; Fannin *v.* Thomasson, 45 Ga. 553; Tuttle *v.* Harrill, 85 N. C. 456.

implication."[1] Ten years later, it was said that "this decision has been acquiesced in and acted on as settled law by the profession from the time it was rendered, and, so far as we are advised, its correctness has never been the subject of judicial doubt."[2] Accordingly, a defendant, who, having an equitable defense to an action of ejectment on the ground that he was entitled to a conveyance from the plaintiff, and who first pleaded such defense, and afterward withdrew it, and suffered judgment to be taken against him, was allowed in a subsequent suit to compel the specific performance of the contract to convey. A like rule prevails where the defendant, pleading an equitable defense, without withdrawing it, fails to appear at the trial, and judgment is therefore given against him without any presentation or consideration of his defense.[3] And even though the rule prevails that equitable defenses must be interposed, it is not operative where a defense exists which could not be made available in the court of law for want of proper parties, or for which, if then interposed, the court could not grant adequate relief.[4] If an equitable defense is interposed, which the court has jurisdiction to entertain, its decision in favor of the plaintiff is conclusive, and the defendant cannot subsequently assert as an affirmative cause of action that which he failed to establish as a defense.[5]

§ 282. **Cross-claims.** — Whenever a plaintiff seeks to recover for some matter which he might have presented in a former action against himself as the foundation for a claim in the nature of a cross-action for damages, the test of his right to recover in the second action, after having waived his cross-claim in the first, is, Can all the facts

[1] Lorraine *v.* Long, 6 Cal. 452.

[2] Hough *v.* Waters, 30 Cal. 309; Hills *v.* Sherwood, 48 Cal. 386; Hill *v.* Cooper, 6 Or. 181; Spaur *v.* McBee, 19 Or. 70.

[3] McCreary *v.* Casey, 45 Cal. 128.

[4] Radcliffe *v.* Varney, 56 Ga. 222; Waters *v.* Perkins, 65 Ga. 32; Spaur *v.* McBee, 19 Or. 70.

[5] Parnell *v.* Hahn, 61 Cal. 131; Preston *v.* Rickets, 91 Mo. 320; St. Louis *v.* Schulenberg, 98 Mo. 613; Winpenny *v.* Winpenny, 92 Pa. St. 440; Reas *v.* Vickers, 27 W. Va. 456; Terrill *v.* Higgs, 1 De Gex & J. 388; Arnold *v.* Alimor, 15 Grant (U. C.), 375.

necessary to support the judgment rendered against him exist at the same time with the facts necessary to support the cross-claim sought to be enforced in the second suit? For if, in order to recover in the first action, the plaintiff must have shown the falsity of the allegations made by defendant in the second suit, then the former judgment is a bar.[1] Thus if plaintiff sues upon a contract to do certain work upon his part, alleging a full performance, and claiming the price stipulated by the contract, his recovery depends upon a full compliance with his agreement, and estops the defendant from afterward contending that he sustained any damage from the non-fulfillment of the contract.[2] Therefore a recovery by a carrier for the amount of his charges for transportation precludes the defendant from maintaining an action for damages for the negligence of such carrier in not transporting the property in due time.[3] A judgment in favor of a physician and surgeon for professional services is a bar to an action against him by the defendant in the former action for malpractice in rendering those services.[4] If, however, a matter in the nature of a defense and cross-claim is pleaded, the contrary of which need not necessarily be established by plaintiff in making out his cause of action under the allegations in his complaint, the defendant may withdraw it at or before the trial, without losing his right to assert it in a subsequent suit. Thus the recovery upon a complaint for work and and labor done, etc., will not estop defendant from recovering damages sustained by him by the manner of performing the work and labor; because the claim of the defendant "not being necessary or at all involved, as part of the plaintiff's evidence, *prima*

[1] Dunham *v.* Bower, 77 N. Y. 76; 33 Am. Rep. 570.

[2] Davis *v.* Tallcot, 12 N. Y. 184. Matters of defense cannot be litigated in a second action, because not pleaded in the first: Hackworth *v.* Zollars, 30 Iowa, 433.

[3] Dunham *v.* Bower, 77 N. Y. 76; 33 Am. Rep. 570.

[4] Blair *v.* Bartlett, 75 N. Y. 150; 31 Am. Rep. 455; Howell *v.* Goodrich, 69 Ill. 556; Haynes *v.* Ordway, 58 N. H. 167; Goble *v.* Dillon, 86 Ind. 327; 44 Am. Rep. 308. *Contra*, Ressequie *v.* Byers, 52 Wis. 650; 38 Am. Rep. 775.

*facie*, it has not been tried or passed upon," and is not barred unless put in issue by the answer.[1] A judgment in favor of the vendor of property for the purchase price thereof does not preclude the vendee from maintaining an action for a breach of a covenant of warranty or of quality made by the vendor.[2] But the defense of a breach of warranty[3] or any other defense set up by way of recoupment or counterclaim, and not withdrawn from the consideration of the court, and adjudged to be insufficient, thereby becomes *res judicata*, and cannot thereafter support an independent action.[4]

PART V. — PLEADINGS TO MAKE FORMER JUDGMENT AVAILABLE.

§ 283. **Necessity of Pleading.** — In all these cases, where a party relying upon a former adjudication as an estoppel had no opportuuity to plead it, it is equally a bar as though an opportunity had been given and it had *been pleaded*.[5] Thus if in an action of trespass *quare clausum* the defendant pleads title in a third person, under whom he claims, without showing how such title was acquired, nor when it accrued, the plaintiff may, at the trial, give in evidence an award against the title of such third person, without pleading it.[6] Where the declaration contains no intimation of the source of plaintiff's title, the defendant is not bound to plead an estoppel, nor to show that the title claimed by plaintiff proceeds from a given source, and then intercept it by pleading a former adjudication. And if an estoppel by judgment or otherwise

[1] Foster *v.* Milliner, 50 Barb. 385; Davenport *v.* Hubbard, 46 Vt. 200; 14 Am. Rep. 620; Bascom *v.* Manning, 52 N. H. 132.

[2] Bodurtha *v.* Phelan, 13 Gray, 413; McKnight *v.* Devlin, 52 N. Y. 399; 11 Am. Rep. 715; Parker *v.* Roberts, 63 N. H. 431; Thoreson *v.* Minn. H. W., 29 Minn. 341; Gilson *v.* Bingham, 43 Vt. 410; 5 Am. Rep. 289; Davis *v.* Hedges, L. R. 6 Q. B. 687.

[3] Earl *v.* Bull, 15 Cal. 421; Timmons *v.* Dunn, 4 Ohio St. 680.

[4] South & N. A. R. R. Co. *v.* Henlein, 56 Ala. 368; Baker *v.* Stinchfield, 57 Me. 363.

[5] Wixson *v.* Devine, 67 Cal. 341; Sheldon *v.* Patterson, 55 Ill. 507; Dame *v.* Wingate, 12 N. H. 291; Dows *v.* McMichael, 6 Paige, 139; Howard *v.* Mitchell, 14 Mass. 241; McNair *v.* O'Fallon, 8 Mo. 188; Isaacs *v.* Clark, 12 Vt. 692; 36 Am. Dec. 372; Woodhouse *v.* Williams, 3 Dev. 508; Ward *v.* Ward, 22 N. J. L. 699.

[6] Shelton *v.* Alcox, 11 Conn. 240.

forms part of the muniment of either party's title, he is no more bound to set it forth in his pleadings than he is to insert therein any of his title deeds.[1]

When the authorities speak of a party having no opportunity to plead a judgment, they use language well calculated to mislead, and to indicate that whenever it is possible for one relying upon an estoppel by judgment to plead it, he must do so. But in this sense the opportunity to plead a judgment is never wanting, unless when it is rendered *pendente lite*, and the court refuses to permit any supplemental pleading. What the courts apparently mean is, that when a claim of right is disclosed in the pleadings, so that its source and character can be known therefrom, and the party claiming the benefit of a judgment can see that the right claimed is one against which his estoppel applies, then he should plead it. Both by the common law and the codes of procedure in force in many of the states, if a plaintiff sues for the possession of property, real or personal, without disclosing the nature or source of his claim of title, the defendant is not obliged to anticipate and understand it, and plead such judgment estoppels as may exist against it. When it is disclosed at the trial, he may, under the general issue, establish any judgment or other estoppel which may exist in his favor.[2] Because the pleadings did not show that the plaintiff would rely upon any title against which the estoppel existed, the defendant is said to have had no opportunity to plead it. When, however, the plaintiff's cause of action is so set forth as to advise the defendant of its source and character, and he wishes to avail himself of a judgment estoppel, he must specially plead it, except where the rules of the common law continue in force, and permit it to be received in evidence under the general issue.[3]

[1] Adams *v.* Barnes, 17 Mass. 365; Clink *v.* Thurston, 47 Cal. 29.

[2] Grum *v.* Barney, 55 Cal. 254; Jackson *v.* Lodge, 36 Cal. 38; Flandreau *v.* Downey, 23 Cal. 358; Young *v.* Rummell, 2 Hill, 481; 38 Am. Dec. 594; Miller *v*, Manici, 6 Hill, 131.

[3] State *v.* Comm'rs, 12 Nev. 17; Norris *v.* Amos, 15 Ind. 365; Fowler *v.* Hait, 10 Johns. 111; Greaves *v.* Middlebrooks, 59 Ga. 240; Turley *v.* Turley, 85 Tenn. 251; Fanning *v.* Ins. Co., 37 Ohio St. 344; 41 Am. Rep. 517.

§ 284. **Effect of Judgment as Evidence when not Specially Pleaded.** — According to the practice at common law, a judgment, though not pleaded as an estoppel, could be given in evidence under the general issue.[1] Upon this point there is no doubt; but upon the question of what effect is to be given to it when so put in evidence, great contrariety of opinion exists. In the celebrated case against the Duchess of Kingston,[2] a case more frequently cited, we think, than any other ever decided in an English court, a former adjudication is spoken of as being "as a plea, a bar; and as evidence, conclusive." Whether the judge writing the opinion in this case understood that a former adjudication was "as evidence conclusive," though not pleaded as an estoppel, or whether he intended the language employed by him should be applicable only to those cases in which the conclusive effect of a former judgment was invoked by the pleadings, is unknown; but it is probable that he designed merely to state to what extent a former adjudication might prevail, if properly insisted upon, by a party entitled to its benefits, and that he had no intention of pointing out the *means* essential to securing those benefits. However this may be, it is certain that a decided preponderance of the authorities in England sustains the view that the record of a former action, if given in evidence under the general issue, when it might have been pleaded as a bar, "is not conclusive, but is a mere matter of argument or inference" in favor of the party presenting it.[3] In the United States, however, the authority of the English decisions on this subject has not been universally respected. Still, there are

[1] Welsh *v.* Lindo, 1 Cranch C. C. 508; Young *v.* Rummell, 2 Hill, 478; 38 Am. Dec. 594; Cook *v.* Field, 3 Ala. 53; 36 Am. Dec. 436; Renkert *v.* Elliott, 11 Lea, 235; Fowlkes *v.* State, 14 Lea, 14; Gilchrist *v.* Bale, 8 Watts, 355; 34 Am. Dec. 469; Chitty's Pleading, 198.

[2] 20 How. St. Tr. 478.

[3] Chitty's Pleading, 198; Outram *v.* Morewood, 3 East, 346; Vooght *v.* Winch, 2 Barn. & Ald. 662; Hannaford *v.* Hunn, 2 Car. & P. 148; Magrath *v.* Hardy, 4 Bing. N. C. 782; Doe *v.* Huddart, 2 Cromp. M. & R. 316; Feversham *v.* Emerson, 11 Ex. 385; Dimes *v.* G. J. Canal Co., 9 Q. B. 469, 517; Hooper *v.* Hooper, McClel. & Y. 509.

a number of cases in this country asserting that a "judgment which if pleaded would have been a perfect bar is, when given in evidence under the general issue, not conclusive on the jury, but only evidence to be weighed by them,"[1] "because if not pleaded the matter is left at large, and the party may think he can do better than he did before."[2]

In New York, the cases are hardly consistent with one another. In *Wright* v. *Butler*, 6 Wend. 284, 21 Am. Dec. 323, it is said: "In actions where the former recovery can be set up in pleading by way of estoppel, the party must plead it, or it will not be conclusive upon the jury in the second action; but in actions of *assumpsit*, etc., where the party has no opportunity to plead the former verdict as an estoppel, the record thereof may be given in evidence, and is conclusive and binding on the party, the court, and the jury as to every fact decided by the former verdict." In *Wood* v. *Jackson*, 8 Wend. 10, 35, 22 Am. Dec. 603, Chancellor Walworth states that "there is a certain class of cases in which the party may avail himself of an estoppel by pleading the same in bar to a suit, or in reply to allegations set out in a plea. In such cases, if he neglects to make the objection in that manner, and puts the facts directly in issue, without pleading the former verdict or decree as an estoppel, the jury may find according to the truth of the case on the issue. *But this principle is only applicable to those cases where special pleading is required;* it does not extend to actions of *assumpsit*, where an estoppel as a former recovery or bar is embraced within and may be given in evidence under the general issue. Neither does it apply to cases where the plaintiff's title is by estoppel, or where the party relying upon the estoppel had no opportunity to plead the same specially as

[1] Haller *v.* Pine, 8 Blackf. 175; 44 Am. Dec. 732; Cleaton *v.* Chambliss, 6 Rand. 86; Town *v.* Nims, 5 N. H. 259; 20 Am. Dec. 578; Howard *v.* Mitchell, 14 Mass. 242; Bartholomew *v.* Candee, 14 Pick. 167; Long *v.* Long, 5 Watts, 103; Smith *v.* Elliott, 9 Pa. St. 345; Adams *v.* Barnes, 17 Mass. 368; Picquet *v.* McKay, 2 Blackf. 465; Ferguson *v.* Miller, 5 Ohio, 460.

[2] Redmond *v.* Coffin, 2 Dev. Eq. 445.

a bar. From these principles it necessarily follows that in ejectment, where special pleading is not allowed, the defendant, in support of his possession, may give in evidence any matter which would have operated as a bar if pleaded by him by way of an estoppel to a real action." These cases, and some others in the same state,[1] incline to the view that in those actions where a judgment can properly be given in evidence under the general issue, its effect is conclusive, unless the case is such that some special pleading is allowed, and, taken altogether, they rather affirm than deny the English rule upon the subject. The greater number of the American cases, however, repudiate the theory that a former adjudication can in any event be properly admitted in evidence for the purpose of determining any issue in the second action by proving how the same issue was determined in the first, without being absolutely *conclusive so far as it is applicable* to the second action. The judgment, if admitted under the pleadings, must be received as, what it purports to be, a final determination of the rights of the parties. The reasons for this departure from English precedents are thus forcibly and convincingly stated by Kennedy, J., in the case of *Marsh* v. *Pier*, 4 Rawle, 273, 26 Am. Dec. 131: "The maxim, *Nemo debet bis vexari, si constat curiæ quod sit pro una et eadem causa*, being considered, as doubtless it was, established for the protection and benefit of the party, he may therefore waive it; and unquestionably, so far as he is individually concerned, there can be no rational objection to his doing so. But then it ought to be recollected that the community has also an equal interest and concern in the matter, on account of its peace and quiet, which ought not to be disturbed at the will and pleasure of every individual, in order to gratify vindictive and litigious feelings. Hence it would seem to follow that wherever on the trial of a cause, from the

[1] Burt *v.* Sternburgh, 4 Cow. 559; 3 Cow. 120; 15 Am. Dec. 256; Miller 15 Am. Dec. 402; Gardner *v.* Buckbee, *v.* Manici, 6 Hill, 114.

state of the pleadings in it, the record of a judgment rendered by a competent tribunal upon the merits in a former action between the same parties, or those claiming under them, is properly given in evidence to the jury, that it ought to be considered conclusively binding on both court and jury, and to preclude all further inquiry in the cause; otherwise the rule or maxim, *Expedit rei publica ut sit finis litium*, which is as old as the law itself, and a part of it, will be exploded and entirely disregarded. But if it be part of our law, and it seems to be admitted by all that it is, it appears to me that the court and jury are clearly bound by it, and not at liberty to find against such former judgment. A contrary doctrine, as it seems to me, subjects the public peace and quiet to the will or neglect of individuals, and prefers the gratification of a litigious disposition on the part of suitors to the preservation of the public tranquillity and happiness. The result, among other things, would be, that the tribunals of the state would be bound to give their time and attention to the trial of new actions for the same causes, tried once or oftener, in former actions between the same parties or privies, without any limitation, other than the will of the parties litigant, to the great delay and injury, if not exclusion occasionally, of other causes which never have passed *in rem judicatem*. The effect of a judgment of a court having jurisdiction over the subject-matter of controversy between the parties, even as an estoppel, is very different from an estoppel arising from the act of the party himself in making a deed of indenture, etc., which may or may not be enforced, at the election of the other party; because whatever the parties may have done by compact, they may undo by the same means. But a judgment of a proper court, being the sentence or conclusion of law upon the facts contained within the record, puts an end to all further litigation on account of the same matter, and becomes the law of the case, which cannot be changed or altered, even by consent of the parties, and is not only

binding upon them, but upon the courts, so long as it shall remain in force and unreversed."[1]

In a case in Maine, the supreme court, declining to pass upon the question, because it was not then material, stated that when it necessarily arose, they should give it a very careful consideration before they would hold "that the conclusiveness of judgments, and the consequent peace of the community, and the convenience of fresh litigants shall depend upon the option of persons litigiously disposed, or upon the accuracy of pleaders."[2] Following this intimation, and, it is to be presumed, upon careful consideration, this court subsequently decided that a former judgment might be pleaded as an estoppel, or given in evidence under the general issue, and that whichever course was *pursued, the result is the same.*[3] In Illinois, the courts "do not sanction the technical distinction which makes a former recovery a bar only when pleaded as an estoppel";[4] and believe that the rule adopted by them "is doubtless the safer rule, and the one alone upon which an end may be made to litigation, and unsuspecting innocence and right may repose regardless of and undisturbed by technical rules of pleading."[5] And the rule generally prevailing upon this subject in the United States is, that any judgment or decree, whenever properly in evidence before the court or jury, is as conclusive as if specially pleaded as a bar.[6]

Aside from considerations of public policy, which apparently influenced some of the American decisions just cited, they seem to be more sustainable than the line of

[1] See also Cist *v.* Zeigler, 16 Serg. & R. 282; 16 Am. Dec. 573; Betts *v.* Starr, 5 Conn. 550; 13 Am. Dec. 94.

[2] Sturtevant *v.* Randall, 53 Me. 149.

[3] Walker *v.* Chase, 53 Me. 258.

[4] Vallandingham *v.* Ryan, 17 Ill. 25.

[5] Gray *v.* Gillilan, 15 Ill. 453; 60 Am. Dec. 761.

[6] Warwick *v.* Underwood, 3 Head, 238; 75 Am. Dec. 767; Blodgett *v.* Jordan, 6 Vt. 580; George *v.* Gillespie, 1 Iowa, 421; Beall *v.* Pearre, 12 Md. 550; Shaffer *v.* Stonebraker, 4 Gill & J. 345; Chamberlain *v.* Carlisle, 26 N. H. 540; King *v.* Chase, 15 N. H. 9; 41 Am. Dec. 675; Taylor *v.* Dustin, 43 N. H. 493; Bethlehem *v.* Watertown, 51 Conn. 490; Offutt *v.* John, 8 Mo. 120; 40 Am. Dec. 125; Garton *v.* Botts, 73 Mo. 274; Flandreau *v.* Downey, 23 Cal. 354; Westcott *v.* Edmunds, 68 Pa. St. 34; Krekeler *v.* Ritter, 62 N. Y. 372; Marston *v.* Swett, 66 N. Y. 206; 23 Am. Rep. 43.

decisions with which they are in conflict. If we concede that principles founded in public policy do not prohibit the parties to an adjudication from reopening by mutual consent matters already litigated, and from indulging their litigious dispositions to an unlimited extent, it does not follow that a court or jury should be at liberty to reinvestigate matters which have been before judicially investigated and determined, when that determination is properly placed before such court or jury to influence the decision in the second action. If a judgment is admissible in any case under the general issue, its admission ought to produce some well-defined and unavoidable result. It ought to be received as conclusive of all the questions settled by it, or rejected altogether. To admit it in evidence, with the understanding that it may be regarded or disregarded, at the pleasure of the court or of the jury, is to establish a rule which authorizes the final determination of the rights of parties, not according to settled and unvariable principles, but at the mere caprice of men. Every law and every interpretation of law must be imperfect and unjust, if, when applied to identical facts, it may result in diametrical judgments. Under the decisions leaving the effect of a former recovery to the caprice or discretion of a court or a jury, it may happen that of two actions, each supported by the same evidence and involving the same issues, a part of the evidence in each case being the record of a former recovery, one action may result in a judgment for plaintiff and the other in a judgment for defendant, and yet the two adverse judgments be equally consistent with law. If the failure to plead a former adjudication in bar is a waiver of the benefits accruing under it, then it should not be allowed to be placed in evidence in the second action. But why should a party be deemed to waive a matter while his pleadings are such that he may lawfully present it in evidence before the jury? Why should the court or jury be at liberty to consider a matter as waived which is included in the

issues, established by the evidence, and relied upon at the argument? The English rule is inconsistent with itself. It treats a former adjudication as inconclusive because not specially pleaded, but permits it to be given in evidence in order that the jury may, if they choose, give it as conclusive an effect as if it were pleaded specially. In the United States this inconsistency will, in time, undoubtedly disappear. In some of the states the rules of pleading are now so altered as to require a former adjudication to be specially alleged by the party relying upon it, when he has an opportunity so to do, before it can be given in evidence. Other states will probably adopt the same rule. But where the common-law system of pleading is retained, a judgment will, no doubt, at some not far distant day of the future, whenever received in evidence, be carried into effect irrespective of the question whether it was admitted under the general issue or in support of a special plea.

PART VI. — ACTIONS TENDING TO CONTRADICT FORMER JUDGMENT.

§ 284 a. **Defenses and Causes of Action Once Presented and Considered** cannot be again asserted in another suit without a violation of the principles of *res judicata*. But the obstinacy with which litigants press their claims upon the attention of courts is such that it is not uncommon for matters once fully determined to be again made, or at least attempted to be made, the subjects of judicial inquiry. Sometimes the circumstances attending a former decision are such as to render the application of the law of *res judicata* apparently a matter of great injustice. Hard cases have long been characterized as the quicksands of the law. Such cases are quicksands in which the law of *res judicata* sometimes sinks so far that the judges are entirely unable to see it, or even to remember it. Generally, however, such is not the case; and the instances are comparatively few in which any cause of action or any matter of

defense is allowed to prevail where it is inconsistent with the facts necessary to uphold any previous adjudication between the same parties. Therefore a plaintiff taking judgment for too small a sum, without the fraud or fault of his adversary, cannot maintain a subsequent action to recover the remainder;[1] nor can a defendant avoid the effect of a judgment against him by showing that the debt on which it was based was void for want of consideration, or that such debt had been merged in a former judgment,[2] or was affected by usury;[3] nor can he maintain an action to recover money which he has been compelled by judgment to pay;[4] nor can parties to a judgment under which land was directed to be sold show in a collateral action that it belonged to them and was ordered sold by mistake.[5] But if the defendant is not personally served with process, and has no notice of the action, and moneys belonging to him are garnished and collected therein, he may maintain an action against the plaintiff for damages, if the latter had no cause of action.[6] But one who had knowledge of an action against him and an opportunity to defend it cannot, while the judgment therein remains in force, recover damages of the plaintiff and others for conspiring against him and thereby procuring such judgment.[7]

§ 285. **Suits for Payments not Credited.** — A few cases have been decided, mainly, if not exclusively, in Massachusetts, in which causes of action have been recognized and enforced, in direct opposition to a former judgment. In the first of these cases, a note was placed in the hands of an attorney for collection. After collecting a portion of the sum due, he failed to give the proper credit, and thereafter sued and recovered judgment for the full amount of the note. The debtor was permitted, while

[1] Ewing *v.* McNairy, 20 Ohio St. 316.
[2] Lewis *v.* Armstrong, 45 Ga. 131.
[3] Heath *v.* Frackleton, 20 Wis. 320; 91 Am. Dec. 405; Thatcher *v.* Gammon, 12 Mass. 268; Footman *v.* Stetson, 32 Me. 17; 52 Am. Dec. 634.
[4] Davis *v.* Young, 36 La. Ann. 374.
[5] Jones *v.* Coffey, 97 N. C. 347.
[6] Powell *v.* Geisendorff, 23 Kan. 538.
[7] Smith *v.* Abbott, 40 Me. 442; White *v.* Merritt, 7 N. Y. 352; 57 Am. Dec. 527.

the original judgment remained in force, to maintain an action against the attorney for money had and received, on the ground that when the attorney received the payment there arose an implied trust that he would credit it on the note.[1] In a later case, the same remedy was held to be available in behalf of a debtor against whom, after reception of a partial payment, the creditor had taken judgment by default for the whole sum.[2] But this decision was subsequently overruled;[3] and we apprehend at the present time the recovery of judgment, while it remains in force, must everywhere be received as conclusive that the amount recovered remained unpaid at the date of the recovery.[4] But if there is an independent agreement that if the defendant will do some act, the plaintiff will accept a less sum than is due, in full satisfaction of a note, and the plaintiff, notwithstanding such agreement, takes judgment for the full sum, an action can be sustained against him for his breach of his agreement.[5] A, having obtained judgment against B, and extended his execution upon certain real estate, thereby became a tenant in common with C. A then sued C for a share of the rents and profits of the estate, and obtained a judgment, which C paid. After this, A's judgment against B was reversed on writ of error. C, while the judgment against him was still unaffected by any proceeding directed against it, was permitted to recover from A the money paid to obtain its satisfaction, on the ground that, from circumstances occurring since the payment to him, A had no right to retain the money.[6] Where an action on a judgment rendered in Kentucky was brought in Texas, the defendant was permitted to avoid it in part by proving that during the progress of the former suit he resided in the last-named state; that he paid a part of the demand before

[1] Fowler *v.* Shearer, 7 Mass. 14.
[2] Rowe *v.* Smith, 16 Mass. 306. See Loring *v.* Mansfield, 17 Mass. 394.
[3] Fuller *v.* Shattuck, 13 Gray, 70; 74 Am. Dec. 622.
[4] Bird *v.* Smith, 34 Me. 63: 56 Am. Dec. 635; Ruff *v.* Doty, 26 S. C. 173; 4 Am. St. Rep. 709.
[5] Hunt *v.* Brown, 146 Mass. 253.
[6] Lazell *v.* Miller, 15 Mass. 207.

judgment *pendente lite*, and reposed confidence in the plaintiff in Kentucky to make the proper credits, who had failed to do so.[1]

§ 286. **Suits for Credits not Allowed.** — There can be no doubt that these decisions are in direct conflict with the true rule upon the subject; that they were induced by yielding to the hardship of the particular cases in which they were pronounced, and are good illustrations of the maxim "that hard cases make bad precedents."[2] They are altogether inconsistent with a vast number of English and American authorities.[3] "It is clear that if there be a *bona fide* legal process under which money is recovered, although not actually due, it cannot be recovered back, inasmuch as there must be some end to litigation."[4] A party having found a receipt for a debt which he had been compelled to pay by judgment, having sought to recover back the money paid, Lord Kenyon, before whom the case came, said: "I am afraid of such a precedent. If this action could be maintained, I know not what cause of action could ever be at rest. After recovery by process of law, there would be no security for any person."[5] To a similar effect is the opinion in a recent English case denying the right to recover back part of a debt paid before judgment, but which plaintiff did not credit. "It is not," said the court, "competent to either party to an action to aver anything either expressing or importing a contradiction to the record which, while it stands, is, as between them, of uncontrollable verity."[6] Substantially the same view is taken in nearly all of the United States.

[1] Clay *v.* Clay, 13 Tex. 195.

[2] 2 Smith's Lead. Cas. 667.

[3] Bobe's Heirs *v.* Stickney, 36 Ala. 482; State *v.* McBride, 76 Ala. 51; Corey *v.* Gale, 13 Vt. 638; Kirklan *v.* Brown, 4 Humph. 174; 40 Am. Dec. 635; Davis *v.* Murphy, 2 Rich. 560; 45 Am. Dec. 749.

[4] Duke de Cadaval *v.* Collins, 4 Ad. & E. 867. A party who made payments on articles sold, and who, in an action for the price of such articles, failed to prove such payments, cannot maintain an action to recover back the amount so paid by him: Wilson *v.* Cameron, 1 Kerr, 542.

[5] Marriott *v.* Hampton, 7 Term Rep. 269. See also Phillips *v.* Hunter, 2 H. Black. 410.

[6] Huffer *v.* Allen, 12 Jur., N S., 930; L. R. 2 Ex. Cas. 15.

The only remedy of the defendant in such cases is by appeal, new trial, proceedings in chancery, or in the nature of an *audita querela*.[1] And no doubt equity would not interfere in his behalf, unless the failure to present his defense of payment was occasioned by accident, surprise, or mistake, or the fraud of the opposite party, unmixed with any contributory fault or negligence of the complainant.[2] In the case of *Binck* v. *Wood*, 43 Barb. 315, it was decided that the maker of a promissory note, against whom a judgment by default had been taken, could not recover for any payment made on the note prior to the suit, and not considered as a credit in entering judgment. The authorities on the subject were reviewed. The early cases in Massachusetts were inconsistent with the case of *Loring* v. *Mansfield*, 17 Mass. 394,[3] and that has been overruled.[4] The case of *Smith* v. *Wilkes*, 26 Barb. 463, was overruled; and the other cases in New York, as well as those in the other states and in England, were declared to unanimously sustain the view that while a judgment is permitted to stand, no money paid upon it can be recovered. If, after the rendition of a judgment, any facts occur making it clear that the judgment should not be enforced, relief may be given in equity, or an action for money had and received may be maintained.[5] No action can be successfully prosecuted to recover back usurious interest included in a judgment which defendant has satisfied.[6]

§ 287. **Suits for Money Paid on Judgments where Defenses are Concealed.** — A brought an action against B to recover the insurance on a lost vessel, and secured a judg-

[1] Kirklan *v.* Brown, 4 Humph. 174; 40 Am. Dec. 635; Corbet *v.* Evans, 25 Pa. St. 310; Tilton *v.* Gordon, 1 N. H. 33; Le Grand *v.* Francisco, 3 Munf. 83; James *v.* Cavit, 2 Brev. 174; Stephens *v.* Howe, 127 Mass. 164; Greenabaum *v.* Elliott, 2 Cent. L. J. 439.

[2] Doyle *v.* Reilly, 18 Iowa, 108; 85 Am. Dec. 182.

[3] They surely are at variance with Stephens *v.* Howe, 127 Mass. 164.

[4] Fuller *v.* Shattuck, 13 Gray, 70; 74 Am. Dec. 622.

[5] Smith *v.* McCluskey, 45 Barb. 610.

[6] Thatcher *v.* Gammon, 12 Mass. 268; Footman *v.* Stetson, 32 Me. 17; 52 Am. Dec. 634.

ment, which was paid. B subsequently commenced suit to recover back the money thus paid, on the ground that the vessel was already lost when the insurance was effected; that he did not know of such loss when the former judgment was obtained, and that such loss was fraudulently concealed by A. The former judgment was determined to be a bar, because "provision being made by the statute for a review of judgments within a time thought reasonable by the legislature, it must be supposed that a limit was intended of the right of parties to complain of the wrong done," and because no reported case could be found "in which the merits of a decided cause have been allowed to be re-examined in any independent action."[1] If an agreement is made to extend the time for payment of a note, this constitutes a matter of defense, which, if not presented, is lost. No action can therefore be sustained for a violation of the agreement. But it is otherwise if the agreement is not to sue for a limited time.[2] A quantity of wheat was purchased, and a nominal sum paid to bind the bargain. The vendee afterwards sued the vendor for non-delivery, and recovered judgment for full value of the wheat. The vendee then sued for the price agreed to be paid for the wheat. The action, it was decided, could not be maintained. The vendee should have insisted on a proper measure of damages. Not having done so, he could not succeed in a cross-action.[3]

§ 288. **Actions by Third Persons.** — The general rule that the law will not allow money paid upon legal process to be recovered back does not apply where the transaction is *res inter alios acta.* The assignee of a bankrupt, not being in privity with him, may recover money taken from the bankrupt, under execution, after his act of bankruptcy.[4]

[1] Homer *v.* Fish, 1 Pick. 436; 11 Am. Dec. 218; First Presbyterian Church *v.* New Orleans, 30 La. Ann. 259; 31 Am. Rep. 224.

[2] Pearl *v.* Wells, 6 Wend. 291; 21 Am. Dec. 328.

[3] Dey *v.* Dox, 9 Wend. 129; 24 Am. Dec. 137.

[4] Follett *v.* Hoppe, 5 Com. B. 243; Phillips *v.* Hunter, H. Black. 402.

§ 289. **Suits for Obtaining Judgments by Fraud, Conspiracy, or Perjury.**—The settled policy of the law forbidding that a matter once adjudicated shall be again drawn in issue while the former adjudication remains in force does not permit the prosecution of an action for obtaining a judgment by false and fraudulent practices,[1] or by false and forged evidence.[2] Neither can a party against whom judgment has been recovered sustain an action against his adversary and the witnesses for damages occasioned by their conspiring together and procuring a judgment by fraud or perjury, as long as the judgment remains in force and unreversed; because the charges made in the second action are conclusively negatived by the former adjudication.[3] Where in process of foreign attachment a judgment has been entered, discharging the trustee on his disclosure, the plaintiff cannot sustain an action on the case against the trustee for obtaining his discharge by falsehood or fraud in his disclosure, and by fraudulent collusion with the principal defendant. The action against the trustee would, if it were allowable, involve a re-examination of the questions determined by his discharge when summoned in the former suit.[4] The defendant in a judgment of foreclosure cannot sustain an action to recover on account of usurious interest included in the judgment. The fact of usury, if it existed, was available as a defense in the former suit; and whether pleaded as a defense or not, is conclusively negatived by the decree of foreclosure.[5] In Kentucky, money coerced from defendant through a judgment procured by fraud may be recovered back from him by an action in equity, without vacating or otherwise set-

[1] Hillsborough *v.* Nichols, 46 N. H. 379; Eugstrom *v.* Sherburne, 137 Mass. 153.

[2] Note 265, by C. H. & E., to Phillipps on Evidence.

[3] Dunlap *v.* Glidden, 31 Me. 435; 52 Am. Dec. 625, citing Damport *v.* Sympson, Cro. Eliz. 520, and Eyres *v.* Sedgewicke, Cro. Jac. 601; Cunningham *v.* Brown, 18 Vt. 123; 46 Am. Dec. 140; Smith *v.* Lewis, 3 Johns. 157; 3 Am. Dec. 469; *post*, sec. 489.

[4] Lyford *v.* De Merritt, 32 N. H. 234.

[5] Heath *v.* Frackleton, 20 Wis. 320; 91 Am. Dec. 405.

ting aside the original judgment.[1] Generally, except in a proceeding to vacate a judgment for fraud, the losing party cannot avoid its effect by urging some fraud existing before the entry of the judgment, and which, had he proved it at the trial, ought to have prevented its rendition. If there was any fraud in the creation of the cause of action, that fact must be interposed as a defense, and if not so interposed, cannot be made the basis of an independent action.[2] A judgment upon a note therefore precludes the defendant from maintaining a subsequent action to cancel the note for fraud in its procurement.[3]

§ 289 a. A judgment for plaintiff in an action for goods sold and delivered is a bar to a subsequent suit by defendant for non-delivery of the same goods.[4]

§ 290. **Motion for Satisfaction.** — The recovery of judgment being conclusive of the amount due, and that the plaintiff is the person to whom it is due, a motion for entry of satisfaction on the ground that plaintiff was not the real party, and that the cause of action belonged to another person, to whom payment has been made since the entry of judgment, is inconsistent with the judgment. Hence no evidence in support of the motion can be heard.[5]

§ 291. **Failure to Give Credit as a Consideration for a Promise.** — While the defendant cannot, leaving the judgment in force, recover of plaintiff a sum which ought to have been credited, but was not, it seems that a promise made after judgment to allow credit for a payment made prior to judgment may be proved by defendant in an action against him on the judgment. This evidence was considered as admissible on the ground that, without directly contradicting the judgment, it disclosed a state

[1] Ellis *v.* Kelly, 8 Bush, 621; West *v.* Kerby, 4 J. J. Marsh. 56.

[2] Lewis *v.* Nenzil, 38 Pa. St. 222; Roff *v.* Doty, 26 S. C. 173; Price *v.* Dewy, 6 Saw. 493.

[3] Arnold *v.* Kyle, 8 Baxt. 319.

[4] Smith *v.* Kelly, 2 Hall, 217.

[5] Mervine *v.* Parker, 18 Ala. 241.

of facts constituting sufficient consideration for the promise of the plaintiff to credit the amount, and that such amount was to be treated as money paid on the judgment.[1] In this instance a consideration for the promise to credit on the judgment was essential to the defendant's partial defense to the second action. In order to establish this consideration, the court listened to evidence whose only object was to show that the former judgment was unjust, and that not to take advantage of its unjustness was a sufficient moral obligation to sustain the promise. In proving this consideration, it therefore appears to us that the former judgment was assailed, and the principle of *res judicata* violated.

§ 292. **Cases in Which Recovery Back was Permitted.** — Where A having sued B, who settled, paying three dollars as a full discharge of A's claim, who thereupon agreed to dismiss his suit, but who, instead of doing so, took judgment for twenty-five dollars, B was permitted to maintain an action for damages in not dismissing according to his agreement.[2] No doubt that although the second suit is predicated upon matters which might have been used as a defense in the first, yet if it involves no inquiry into the merits of the former judgment, and is sustainable on grounds entirely independent of such judgment, the rule inhibiting relitigation of decided issues is in no danger of violation. But great contrariety of opinion is likely to become manifest in deciding whether a second suit is sustainable on grounds not involved in the first, and actions will no doubt occasionally be prosecuted with success, and result in a seeming disregard of some former adjudication. Thus in *Whitcomb* v. *Williams*, 4 Pick. 228, the plaintiff, having purchased goods of the defendants, paid them partly in cash and partly by his note. He afterwards discovered that he had paid for more than he received; but nevertheless he suffered judgment to be

[1] Thayer *v.* Mowry, 36 Me. 287.

[2] Cobb *v.* Curtiss, 8 Johns. 470.

taken against him on the note, without interposing his defense of want of consideration. He then sued to recover back the amount paid on this judgment, and prevailed, because, in the opinion of the court, the giving of the note was equivalent to payment for the goods, and a cause of action immediately arose, and steered clear of the note and the judgment thereon; and though the mistake might have been corrected in the suit on the note, yet that the plaintiff had a right of election, as in cases of set-off.

PART VII. — THE EFFECT OF JUDGMENTS IN VARIOUS ACTIONS.

FIRST. — IN ACTIONS INVOLVING TITLE TO OR THE POSSESSION OF REAL ESTATE.

§ 293. **Distinction between Application of Res Judicata to Real and to Personal Actions.** — The high regard of the people among whom the common law grew into being for real property evinced itself in a vast variety of ways in the different branches of that law, and in none of those branches did it make itself more evident than in that regulating the effect of former adjudications. The pursuit of any of the forms of personal action to a judgment on the merits completely barred all other actions based on the same right in every other form. But that the law gave "consecutive remedies for injuries to real estate is recognized in all the books that treat on real actions. It is stated by Booth in the first page of his book. He recommends beginning with the lower rather than with the higher remedy; for he says 'a recovery in that of the lower nature will not be a bar to an action of a higher nature, and therefore it is not prudent to set forth a writ of right, when you may have a writ of entry.'" He cites *Ferrer's Case*, 6 Coke, 7. In that case, it was decided that there was a difference between real and personal actions; that in personal actions the bar is perpetual, for the plaintiff cannot have an action of a higher nature; but if demandant be barred in a real action by judgment, he

may have an action of a higher nature to try the same right again.[1] In Viner's Abridgment it is said that "a recovery in assize is no bar to a formedon. A recovery in assize is a bar to another assize, but not in *mort d'ancestor;* nor is a recovery in *mort d'ancestor* a bar to a writ of right."[2] Under the common-law system of procedure, "a judgment, therefore, in each species of action is final only for its own proper purpose and object, and no further. A judgment in trespass affirms the right of possession to be, as between plaintiff and defendant, in the plaintiff at the time the trespass was committed. In a real action it affirms a right to the freehold of the land to be in the demandant at the time of the writ brought. Each species of judgments, from one in an action of trespass to one upon a writ of right, is equally conclusive upon its own subject-matter."[3] "A bar in a real action, by judgment on demurrer, confession, verdict, etc., is a bar to any other action of the like nature for the same thing, which is the case likewise in personal actions; but in personal actions the bar is perpetual, and the defendant has no remedy but by writ of error or attaint. In real actions, on the contrary, if a man is barred by judgment in one action, he may bring another of a higher nature, and try the same right again. Thus if barred in an assize of novel disseisin, yet upon showing a descent or other special matter, he may have an assize of *mort d'ancestor*, a writ of *aiel*, or *besael*, or of entry *sur disseisin* to his ancestor. So if a man is barred in a formedon in *descender*, yet he may have a formedon in *reverter* or *remainder*, for that is an action of a higher nature, and in which the fee-simple is to be recovered. But a recovery in assize is a bar to every other assize, and in a writ of entry in nature of an assize, for they are both brought upon the plaintiff's own possession, and are of the same nature,

[1] Arnold *v.* Arnold, 17 Pick. 4.
[2] Vin. Abr., tit. Judgment, Q.
[3] Outram *v.* Morewood, 3 East, 346; Gray *v.* Gillilan, 15 Ill. 453; 60 Am. Dec. 761.

and a judgment in a writ of *aiel* is a bar in a writ of *besael* or *cosinage*, for they are both ancestral actions of the same nature."[1]

§ 294. **Common Recovery.** — A judgment in common recovery is as conclusive as in any other case. It cannot be collaterally assailed, except for fraud, or, as in other real actions, because the defendant was not a tenant of the freehold. If there is a proper tenant of the freehold, all the expectant interests are involved in the result. The issue in tail cannot falsify any point tried by the action. The judgment is, that demandant recover his title to the land. No one claiming under the title represented by the tenant *in præcipe* can avoid this judgment otherwise than by writ of error. If there was no such judgment against the voucher as would give to those in remainder the nominal recompense which belongs to the form, this does not avoid the judgment, but only affects its regularity.[2]

§ 295. **Ejectment at Common Law.** — At common law, a judgment in ejectment is not, in any case, conclusive upon *the title* of either of the parties.[3] "It is a recovery of the possession without prejudice to the right as it may afterward appear even between the same parties."[4] Its only effect "is to put plaintiff in possession according to his right and title in the premises."[5] "It is always in the power of the party failing, whether claimant or defendant, to bring a new action. The structure of the record also renders it impossible to plead the former

[1] Roscoe on Real Actions, 213, citing Com. Dig., tit. Action, K, 1, 3; Robinson's Case, 5 Rep. 32 b; Cowper *v.* Andrews, Hob. 40; Portington's Case, 10 Rep. 38 a.

[2] Ransley *v.* Stott, 26 Pa. St. 126; 1 Rolle, 447; 3 Bulst. 247.

[3] Mitchell *v.* Robertson, 15 Ala. 412; Hinton *v.* McNeil, 5 Ohio, 509; 24 Am. Dec. 315; Pollard *v.* Baylors, 6 Munf. 433; Holmes *v.* Carondelet, 38 Mo. 551; Smith *v.* Sherwood, 4 Conn. 276; 10 Am. Dec. 143; Moran *v.* Jessup, 15 U. C. Q. B. 612; Clubine *v.* McMullen, 11 U. C. Q. B. 250.

[4] Atkins *v.* Horde, 1 Burr. 114; Jackson *v.* Dieffendorff, 3 Johns. 270. This rule remains in force in Missouri: Avery *v.* Fitzgerald, 94 Mo. 207; Spencer *v.* O'Neill, 100 Mo. 49; Sulton *v.* Dameron, 100 Mo. 141; Kimmel *v.* Benna, 70 Mo. 52.

[5] Minke *v.* McNamee, 30 Md. 294; 96 Am. Dec. 577.

recovery in bar to the second ejectment; for the plaintiff in the suit is only a fictitious person, and as the demise term, etc., may be laid in many different ways, it cannot be made to appear that the second ejectment is brought upon the same title as the first."[1] Several verdicts in favor of the same party, and his adversary's accepting a lease and promising to give no more trouble, are not conclusive against the latter.[2] But, notwithstanding its inconclusive effect, a judgment in ejectment seems to have, even at common law, been admissible in evidence in a second ejectment, where the parties were substantially the same as in the first, and to have been allowed to go to the jury in the second action, to be by them treated as persuasive, though not conclusive, evidence of the facts upon which it was based.[3] "The inconclusiveness of a verdict and judgment in ejectment is due to the form of the action, not to the character of the subject-matter of the controversy. There is no charm about land, as land, which relieves it from the operation of the general rule that a judgment between same parties or their privies directly upon the same matter is the end of the controversy. That it is an estoppel against future litigation of the same question is evident from the fact that a fine, a common recovery, a simple judgment on a writ of right, and indeed judgments in any *real action*, have always been held conclusive."[4] In some portions of the United States the rules regarding actions of ejectment have been so far modified that two judgments to the same effect are conclusive upon the title, though one alone is not.[5]

§ 296. **In Ejectment upon Confession.** — In Kentucky, the fact that a judgment in ejectment was rendered

[1] Adams on Ejectment, 351.

[2] Richardson *v.* Stewart, 2 Serg. & R. 87.

[3] Doe *v.* Seaton, 1 Tyrw. & G. 19; 2 Cromp. M. & R. 728; Wright *v.* Tatham, 1 Ad. & E. 3; Bull N. P. 232 b; Doe *v.* Wright, 10 Ad. & E. 763; Thompson *v.* Hall, 31 U. C. Q. B. 375.

[4] Stevens *v.* Hughes, 31 Pa. St. 381.

[5] Boyle *v.* Wallace, 81 Ala. 352; Drexel *v.* Man, 2 Pa. St. 271; 44 Am. Dec. 195; Kinter *v.* Jenks, 43 Pa. St. 445; Woolston's Appeal, 51 Pa. St. 452; Baze *v.* Arper, 6 Minn. 220; Britton *v.* Thornton, 112 U. S. 526; Jones *v.* De Graffenried, 60 Ala. 145.

upon confession does not make it more conclusive than if it were based on the verdict of a jury;[1] but in Pennsylvania the rule is otherwise. A judgment by confession in ejectment is there "treated as a solemn judicial confession of want of title,—a total and unconditional surrender of the field of controversy,—and, as such, conclusive forever on the defendant and all his privies."[2] In Illinois, a judgment in ejectment, when the defendant was defaulted, does not become conclusive until two years after its entry.[3]

§ 297. **In Actions for Mesne Profits.** — In actions for mesne profits, a judgment in ejectment is, as against defendant, conclusive evidence of title in the lessor of the plaintiff from the time of the demise laid in the declaration, and that he was not in possession at the institution of his ejectment suit.[4] Beyond the time laid in the demise it proves nothing, because beyond that time the plaintiff alleged nothing;[5] nor does it prove that the plaintiff was not in possession between the date laid in the demise and the commencement of the action.[6]

§ 298. **Payment of Costs.** — The action of ejectment is said to be peculiarly a creation of the court. The court will so far control its creation as to stay proceedings in the second suit, if the costs resulting from failure in a former suit remain unpaid,[7] if it appear that the second

[1] Botts *v.* Shields, 3 Litt. 32.

[2] Secrist *v.* Zimmerman, 55 Pa. St. 446.

[3] Cadwallader *v.* Harris, 76 Ill. 372.

[4] Graves *v.* Joice, 5 Cow. 261; Leon *v.* Burtis, 5 Cow. 408; Postens *v.* Postesn, 3 Watts & S. 182; 38 Am. Dec. 752; Brothers *v.* Hurdle, 10 Ired. 490; 51 Am. Dec. 400; Shumake *v.* Nelms, 25 Ala. 126; Brewer *v.* Beckwith, 35 Miss. 467.

[5] Shumake *v.* Nelms's Adm'r, 25 Ala. 126; note 270, by C. H. & E., to Phillipps on Evidence; Buntin *v.* Duchane, 1 Blackf. 56; Aslin *v.* Parkin, 2 Burr. 666; Dewey *v.* Osborn, 4 Cow. 329; Doe *v.* Langs, 9 U. C. Q. B. 676; Thompson *v.* Hall, 31 U. C. Q. B. 376; West *v.* Hughes, 1 Har. & J. 574; 2 Am. Dec. 539; Crockett *v.* Lashbrook, 5 T. B. Mon. 531; 17 Am. Dec. 98; Hinton *v.* McNeil, 5 Ohio, 509; 24 Am. Dec. 315. A judgment by default in ejectment is, in England, good evidence of title for plaintiff in an action for mesne profits; but is not even *prima facie* evidence that defendant was in possession: Pearse *v.* Coaker, L. R. 4 Ex. 92.

[6] West *v.* Hughes, 1 Har. & J. 574; 2 Am. Dec. 539.

[7] Danvers *v.* Morgan, 17 Com. B. 530.

action turns on the same question of title as the first, though a different parcel of land be claimed and a different person be made defendant.[1] This seems to be the only power which the courts have reserved by which, if need be, to prevent this, *their creation*, from perpetually harassing the occupants of real estate by the repeated assertion of pretensions whose worthless character has been judicially ascertained.

§ 299. **Ejectment Modified by Statutes.** — Wherever the common-law form of ejectment is abolished, and the action is commenced by the parties in their own names, the judgment is an estoppel, — a valid bar to any subsequent action, — unless the privilege of commencing another is given by statute.[2] Technically and substantially, under the form of procedure in which the action to recover real estate is conducted in the name of the real claimant, who need not depend for his success on anything but his *title*, we no longer have an action of ejectment. "We can see no reason why a judgment upon a matter in regard to realty, once put in issue, litigated, and determined, whether it be title, right to present possession, or something else, should not be conclusive, as well as when it relates to personalty. No principle of the common law would be violated by such a result. Nor would it be contrary to any principle of public policy. The form of the complaint in an action to recover real estate may be adapted to the estate sought to be recovered, and the facts desired to be put in issue."[3] A judgment in ejectment, like every other

[1] Doe on Demise; Brayne *v.* Bather, 12 Q. B. 941.

[2] Sturdy *v.* Jackaway, 4 Wall. 174; Miles *v.* Caldwell, 2 Wall. 35; Beebe *v.* Elliott, 4 Barb. 457; Sheridan *v.* Andrews, 3 Lans. 129; Campbell *v.* Hall, 16 N. Y. 575; Castle *v.* Noyes, 14 N. Y. 329; Fitch *v.* Cornell, 1 Saw. 156; Oetgen *v.* Ross, 54 Ill. 79; Doyle *v.* Hallam, 21 Minn. 515; Parks *v.* Moore, 13 Vt. 183; 37 Am. Dec. 589; Hodges *v.* Eddy, 52 Vt. 434.

[3] Caperton *v.* Schmidt, 26 Cal. 479; 85 Am. Dec. 187; Dawley *v.* Brown, 79 N. Y. 390; Bouger *v.* Hobbs, 67 Ill. 592; Johnson *v.* Pate, 90 N. C. 334; Troutman *v.* Vernon, 1 Bush, 482; Benton *v.* Benton, 95 N. C. 559; Sobey *v.* Beiler, 28 Iowa, 323; Hill *v.* Cooper, 8 Or. 254; Allen *v.* Salinger, 103 N. C. 14; Sims *v.* Sims, 19 Ga. 124; Glover *v.* Stamps, 73 Ga. 209; 54 Am. Rep. 870.

final adjudication, bars only the causes of action and matters of defense put in issue in the former suit, or which, if not put in issue, were of such a nature that the neglect to put them in issue was an irrevocable confession of their non-existence.[1] It is not the fact that the land sought to be recovered in two actions is the same that creates an estoppel, but the fact that the issues are the same.[2] If the plaintiff relies upon a lease executed to him by the defendant, and which in the present action estops the defendant from denying the title of his landlord, the judgment should leave the defendant free, after yielding up possession, to contest his landlord's title in another action.[3] Where the owner of land is by law entitled to all crops growing thereon, his recovery in ejectment because it is conclusive that he is the owner of the land is equally conclusive of his ownership of the crops thereon growing.[4] Even where the common-law rules respecting the action of ejectment and the inconclusiveness of judgments therein prevail, if an action is brought upon an equitable title, in a state in which such action is sustainable, it has the character of a suit in equity, and the judgment entered therein is conclusive.[5] So if, to defeat an action of ejectment, an equitable defense is interposed, and the court decides it not to be well founded, the defendant is estopped from maintaining an independent suit founded on the same equity.[6] If the plaintiff sues for two parcels of land and recovers but one, or for a large tract and recovers but a part thereof, the judgment, though silent as to the part not recovered, is nevertheless conclusive that the plaintiff was not entitled thereto.[7] No doubt the parties in their pleadings may limit their controversy to a particular title.[8] But in the absence of any limitation made by the

[1] Foster *v.* Evans, 51 Mo. 39.
[2] Dawley *v.* Brown, 79 N. Y. 390.
[3] Benton *v.* Benton, 95 N. C. 559.
[4] Craig *v.* Watson, 68 Ga. 114.
[5] Seitzinger *v.* Ridgeway, 8 Watts, 496; Taylor *v.* Abbott, 41 Pa. St. 352; Winpenny *v.* Winpenny, 92 Pa. St. 440.
[6] Chouteau *v.* Gibson, 76 Mo. 38; Preston *v.* Rickets, 91 Mo. 320.
[7] Thompson *v.* McKay, 41 Cal. 221; Woodin *v.* Clemons, 32 Iowa, 280.
[8] Marshall *v.* Shafter, 32 Cal. 176.

pleadings, the defendant must, at his peril, protect all his rights in the land, or connected therewith. If, after erecting buildings, he suffers judgment to be taken against him for the possession of the land, he cannot surrender possession and afterward maintain an action against the plaintiff for the value of the buildings.[1]

§ 300. **What Pleadings Involve Title.**—If a complaint alleges that plaintiff was at a specified time possessed of lands, and that he claims such lands in fee-simple absolute, and that being so possessed thereof, and being so the owner thereof, the defendant entered and ejected plaintiff, etc., it tenders an *issue of title*. If to this complaint the defendant makes a general denial, a subsequent judgment for defendant is conclusive upon all the title held by the plaintiff at that time.[2] "It must be admitted by every one that a recovery operates as an estoppel to this extent, to preclude the losing party from denying that as to him the prevailing party was at the time of the rendition of the judgment entitled to the possession. It would seem necessarily to follow that, in order to avoid the estoppel, the losing party must show *other right* to possession than that which he had when the estoppel was created. He is bound to show such right, because his former claim of right was determined by the recovery."[3]

§ 301. **Issues Concluded by Judgment in Ejectment.**—Under the code, a judgment in ejectment is conclusive of but two points: the right of possession in plaintiff at the commencement of the suit, and the occupation of the premises by the defendant at the same date. At common law, the judgment was, in an action for mesne profits, conclusive of title at the time of the alleged demise. Under our practice the rule is different, because the plaintiff is entitled to recover upon proof of right to the possession at the commencement of his suit; and an allegation on

[1] Doak *v.* Wiswell, 33 Me. 355.
[2] Marshall *v.* Shafter, 32 Cal. 176.
[3] Marshall *v.* Shafter, 32 Cal. 176.

his part in relation to the date of the acquisition of his title is immaterial.[1]

§ 302. **Avoiding Effect of Former Judgment.**—Whenever, in an action for possession of realty, the question of title is put in issue by the pleadings, the judgment *prima facie* constitutes an estoppel to the assertion of any title which existed in the losing party at the time of the former suit. To avoid this estoppel he may show that by reason of some lease or license his title could not be asserted in the former suit.[2] Judgment in ejectment never affects after-acquired title. Therefore a defeated party may in any subsequent suit show, by parol or otherwise, that the right to the possession has come to him since the former suit.[3] Upon reasoning not adapted to our comprehension, the supreme court of Vermont determining the effect of a judgment in ejectment, wherein the plaintiff recovered a part only of the land sued for, held that as to the lands not recovered this was a conclusive adjudication that the plaintiff had no title thereto, and that he could not avoid the effect of the judgment by showing that the defendant at the commencement of the former action was not in possession of any part of the land which the plaintiff therein failed to recover in the first action.[4] If, as the plaintiff claimed, the defendant was not in possession of part of the premises when the first action was brought, that fact constituted a perfect defense, and one which must have been sustained without considering the question of title; and the judgment ought not to have protected the defendant when he subsequently for the first time ousted the plaintiff.

§ 302 a. **Judgments in Actions of Forcible Entry and Unlawful Detainer** are, to the same extent as judgments in other actions, conclusive upon the questions within the

[1] Yount *v.* Howell, 14 Cal. 465; Satterlee *v.* Bliss, 36 Cal. 489.

[2] Sherman *v.* Dilley, 3 Nev. 21; Chase *v.* Irvin, 87 Pa. St. 286.

[3] Mahoney *v.* Van Winkle, 33 Cal. 448; Emerson *v.* Sansome, 41 Cal. 552. See *post*, sec. 329.

[4] Hodges *v.* Eddy, 52 Vt. 434.

issues, and determined by the court or confessed by the parties.[1] If a judgment is in favor of a plaintiff who sues as landlord to recover of defendants for holding over, such judgment is conclusive against them of the existence of the lease and their unlawful holding over.[2] And where defendant claims to have constructive possession of tract A by reason of his occupation of tract B, and judgment for the possession of the latter tract has been recovered against him in an action of forcible entry, such judgment is conclusive evidence against him that his entry on tract B "was a forcible intrusion on plaintiff's possession, and when restitution was made under the judgment, the *statu quo* was restored, and the defendant's possession" of the tract B "became from the beginning the possession of the plaintiff, and all constructive possession arising out of the actual possession under color of title was thereby extinguished."[3] So when, to maintain an action of forcible entry and detainer, the plaintiff must establish an actual prior possession, a judgment in his favor is conclusive that he had had such possession.[4] The title to the property is never in issue in these actions; and therefore the judgment, whether for plaintiff or defendant, cannot affect the title.[5] The failure of plaintiff to recover in such an action is a bar to his subsequent recovery upon the same cause of action; but does not preclude him from sustaining the second suit, if he can show that from failure to give the requisite notice, or from some other cause since removed, the former judgment was rendered against him.[6]

§ 303. **Judgments of Foreclosure.** — If, under the statutes of a state, proceedings for the foreclosure of a mort-

[1] Dale *v.* Doddridge, 9 Neb. 138; Beeler *v.* Cardwell, 29 Mo. 72; 77 Am. Dec. 550; Harvie *v.* Turner, 46 Mo. 444; Mitchell *v.* Davis, 23 Cal. 381.

[2] Norwood *v.* Kirby, 70 Ala. 397.

[3] Bradley *v.* West, 68 Mo. 72.

[4] Brady *v.* Huff, 75 Ala. 80.

[5] Mattox *v.* Helm, 5 Litt. 185; 15 Am. Dec. 64; Fish *v.* Benson, 71 Cal. 428; Casey *v.* McFalls, 3 Sneed, 115; Riverside Co. *v.* Townsend, 120 Ill. 9; Equitable Trust Co. *v.* Fisher, 106 Ill. 189. In Kansas, the statute specially provides that judgments in actions of forcible entry and unlawful detainer "shall not be a bar to any after-action brought by either party": Waits *v.* Teeters, 36 Kan. 604.

[6] Merrin *v.* Lewis, 90 Ill. 505.

gage may be and are *ex parte*, the judgment entered therein cannot be conclusive, where there was no defense, for the obvious reason that there is no person, by proper process, brought within the jurisdiction of the court.[1] Where, however, proper parties are brought before the court, a judgment either foreclosing or refusing to foreclose a mortgage or other lien is conclusive of all the issues necessarily determined by it. The ordering of a sale is conclusive of the existence of the debt and of the lien,[2] and when followed by a sale, a conveyance pursuant to such sale is, as against the parties to the action, equivalent to a conveyance made by the mortgagor, at the moment when the lien was created.[3] The mortgagor and the other parties to the action cannot, after judgment against them, be permitted to show that before judgment the mortgage debt had been paid, or that the decree was taken contrary to agreement,[4] or that the mortgage was not supported by a proper or sufficient consideration.[5] The judgment in a writ of entry to foreclose a mortgage is conclusive on all the title held by defendant at the date of the judgment.[6] If the defendant in a foreclosure suit answers, claiming the whole equity of redemption, and the complainant makes no replication, the decree will be conclusive on the latter, so that he cannot afterwards set up other claims.[7] Where a bill was opposed by the widow of a deceased mortgagor on the ground that the property mortgaged was hers, and the court found that the husband had a life estate, and directed such estate to be sold, it was held that the rights of the mortgagees were thereby confined to the life estate, and that they could not, in any subsequent action, show that the same property belonged absolutely to the husband.[8] In an action

[1] Craft *v.* Perkins, 83 Ga. 760.
[2] Hayes *v.* Shattuck, 21 Cal. 51; Dyer *v.* Hopkins, 112 Ill. 168.
[3] Batterman *v.* Albright, 122 N. Y. 481; 19 Am. St. Rep. 510.
[4] Windlett *v.* Life Ins. Co., 130 Ill. 621; Spinks *v.* Glenn, 67 Ga. 744.
[5] Watson *v.* Camper, 119 Ind. 60.
[6] Shears *v.* Dusenbury, 13 Gray, 292.
[7] Tower *v.* White, 10 Paige, 395.
[8] Manigault *v.* Holmes, 1 Bail. Eq. 283.

for foreclosure, no rights ought to be litigated except those which are claimed under the mortgagor. If the court undertakes to determine claims hostile to the title of the mortgagor, its decree will certainly be erroneous, and liable to reversal in an appellate court; but it is not *coram non judice* and void. On the contrary, it is valid until reversed, and is not subject to any collateral attack.[1] But the priority of respective liens is a proper question to be determined in a foreclosure suit. If a decree disposes of the question of precedence between two mortgages, it is final upon *that point*, though the bill neither asked for such a decision nor for general relief. The words "that it is ordered, adjudged, and decreed that the defendants and all persons claiming under them, or either of them, since the commencement of this cause be forever barred and foreclosed of their equity of redemption, and claim of, in, or to the mortgaged premises, and every part and parcel thereof," are sufficient to show the decision of a question of priority and to prevent its being again contested.[2] If a defendant answers, asserting that he has a junior mortgage and also a judgment lien, for both of which he prays a decree of foreclosure, and the decree finally rendered recognizes the judgment lien, and is silent respecting the mortgage, it is conclusive against the existence and lien of such mortgage.[3] A decree ordering a sale necessarily negatives every claim that the premises, for some reason, are not subject to sale. Hence the homestead interest is necessarily disposed of by a decree to which both husband and wife are parties; and neither can therefore successfully resist an action for property sold under an order of sale issued in a suit to which he or she was a party on the ground that the land sold is a homestead.[4] So a decree adjudging the mort-

[1] Board of Supervisors *v.* M. P. R. R. Co., 24 Wis. 121; Bundy *v.* Cunningham, 107 Ind. 360; Ulrich *v.* Dreschell, 88 Ind. 354.

[2] Board of Supervisors *v.* M. P. R. R. Co., 24 Wis. 123.

[3] Haines *v.* Flinn, 26 Neb. 380; 18 Am. St. Rep. 785.

[4] Lee *v.* Kingsbury, 13 Tex. 68; 62 Am. Dec. 546; Baxter *v.* Dear, 24 Tex. 17; 76 Am. Dec. 89; Honaker *v.* Cecil, 84 Ky. 202.

gagee entitled to the rents and appointing a receiver to collect them precludes the mortgagor from claiming that such rents are exempt.[1]

If specified persons are made defendants, and it is alleged that they claim some interest in the premises "as subsequent purchasers or encumbrancers, *or otherwise*," a general decree will preclude them from asserting any rights acquired from the mortgagor after the execution of the mortgage. But it will not divest any rights held paramount to the title of the mortgagor when he executed the mortgage.[2] The right of the wife of the mortgagor to dower is such a paramount right. If she, after becoming a widow, is made a party to a suit to foreclose a mortgage executed by her husband alone, and no allegation is made in the bill in reference to her claim for dower, the decree will not be considered as affecting her dower estate.[3]

One who is made a party defendant to a suit to foreclose a mortgage or other lien may have an interest in the premises in two or more capacities, and may sometimes be bound in one capacity without being affected in the other. If he is interested in a representative capacity, and the complaint contains no statement concerning the capacity in which he is sued, some, and perhaps all, of the courts will regard him as being made a party only in his personal or private capacity. Hence where one who was an assignee in bankruptcy of a mortgagor was made a party to a foreclosure suit without any reference in the proceedings to his being sued as assignee, it was held that the decree of foreclosure and the sale thereunder did not affect the title held by him as assignee.[4] On the other hand, if one is made a defendant in a representative capacity only, it will not conclude him in his private capacity. Therefore judgment against an executrix foreclosing a mortgage made by her deceased husband will not estop her from

[1] Storm *v.* Ermantrout, 89 Ind. 214.

[2] Frost *v.* Koon, 30 N. Y. 444; citing Lewis *v.* Smith, 11 Barb. 156; Bank of Orleans *v.* Flagg, 3 Barb. Ch. 318; Elliott *v.* Pell, 1 Paige, 263.

[3] Lewis *v.* Smith, 9 N. Y. 502; 61 Am. Dec. 706; Merchants' Bank v. Thomson, 55 N. Y. 7; *post*, sec. 303 a.

[4] Landon *v.* Townshend, 112 N. Y. 93; 8 Am. St. Rep. 712.

resisting the issuing of a writ of assistance to put the purchaser in possession, on the ground that the property mortgaged was a homestead, and the mortgage therefore void because she did not join therein.[1] Where the rule prevails that title claimed adversely to the mortgagor cannot be litigated in a suit to foreclose the mortgage, and where the husband of a married woman is a proper party to any suit affecting her separate property, the foreclosure of a mortgage executed by a wife, but not by her husband, though he was a party defendant to the foreclosure, will not estop him from insisting that the property mortgaged was not her separate property, and therefore that the title thereto has not been affected by the decree of foreclosure and the sale pursuant thereto.[2]

§ 303 a. **Judgments Affecting Right of Dower.** — It seems that in order to conclude the wife's right of dower it must in all cases be necessarily and specifically put in issue, whether the proceeding be to foreclose a mortgage to which the wife was not a party, or to enforce any other claim to which her right of dower was paramount. M. and wife conveyed their real property to his brother. M.'s creditors subsequently recovered judgment against him and obtained the appointment of a receiver. This receiver obtained a judgment against M. and wife and M.'s brother, declaring the conveyance fraudulent and void as to creditors, and directing a sale of the premises, and that the parties in possession should deliver possession to the purchaser. Prior to the sale M. died. His wife brought an action to recover dower in the premises, and the judgment against her in the action to set aside the deed was claimed to bar her from asserting any claim to dower, although she had not presented any such claim in her answer, nor did the judgment purport to dispose of any such claim. The court of appeals, in disposing of this branch of the case, said: "She is bound by that judgment,

[1] Stockton B. & L. Ass'n *v.* Chalmers, 75 Cal. 322; 7 Am. St. Rep. 173.

[2] McComb *v.* Spangler, 71 Cal. 418.

whatever may be its legitimate effect. The judgment is final and conclusive upon her as to all matters put in issue and litigated in the action. But, as stated above, the matter of her inchoate right of dower was not put in issue and litigated therein. . . . . The plaintiff in this action might have raised in that action the question that she had a right of dower, as yet inchoate, but which might become complete; and might have asked that if it should be found to exist, the judgment should make provision therefor. But was she bound to do so? This would not have been matter in direct opposition to the action in defense to the claim made by the plaintiffs therein; it would have been a *quasi* admission of the cause of action set up, and a seeking for relief in the judgment which must follow. And when the authorities say that a judgment is final and conclusive upon the parties to it as to all matters which might have been litigated and decided in the action, the expression must be limited as applicable to such matters only as might have been used as a defense in that action as against an adverse claim therein, and such matters as if now considered would involve an inquiry into the merits of the former judgment. The existence of an inchoate right of dower in the plaintiff would not have been a defense to the action of the receiver for a sale of the premises and a satisfaction from the avails of the sale of the judgment debt which he represented. It could not, if pleaded and shown, have prevented a judgment substantially that which was rendered. The most which could have been effected would have been to have secured in the judgment an auxiliary provision recognizing and protecting the contingent right. And again, it was a right pre-existent the claims and defenses there litigated, and paramount to any right of the plaintiff in that action there sought to be enforced. . . . . We are of the opinion that the plaintiff is not estopped by the record in the action brought by the receiver."[1] But when

[1] Malloney *v.* Horan, 49 N. Y. 115; 10 Am. Rep. 335; Grover, J., dissenting.

an action is brought for an assignment of dower, or the claim to dower is otherwise brought in issue and determined, the judgment is conclusive of every issue essential to its support. If the application to have dower assigned is denied, this is, in all subsequent proceedings, conclusive of the non-existence of the right to have dower assigned.[1] If it is granted, the judgment is equally conclusive, not only in favor of the right to dower, but also that every fact necessary to that right existed, as that the husband of the claimant died seised of the premises out of which her dower was assigned.[2]

§ 304. **Judgments of Partition.** — We find it declared in one case that "a writ of partition, or a petition for partition, which is but a substitute for the former, is a mere possessory action," and that it at most can bar nothing but possessory actions.[3] There are other authorities indicating that a judgment in partition was but a segregation into separate parcels of the titles which the parties before held, and that it had no force as an estoppel.[4] Doubtless there may have been and may yet be cases in which a particular claim of title is the only one which is put in issue, and in which the final judgment may affect nothing but such title. But at the present time there can be no doubt that a judgment in a proceeding for the partition of lands is as conclusive upon the matter put in issue and tried as a judgment in any other proceeding, and may be set up as a bar to a writ of entry involving the same questions of title.[5] And a suit for partition is perhaps the only proceeding known to the law in which every possible question affecting the title to real estate may be made an issue and determined, and in

[1] Erum *v.* Brady, 48 Mo. 560.

[2] Gay *v.* Stancell, 76 N. C. 369; Signon *v.* Haun, 86 N. C. 310.

[3] Mallett *v.* Foxcroft, 1 Story, 474.

[4] Nicely *v.* Boyles, 4 Humph. 177; 40 Am. Dec. 638; Whitlock *v.* Hale, 10 Humph. 63; McClure *v.* McClure, 14 Pa. St. 136; Tabler *v.* Wiseman, 2 Ohio St. 211; McBain *v.* McBain, 15 Ohio St. 337; 86 Am. Dec. 478.

[5] Whittemore *v.* Shaw, 8 N. H. 393; Doolittle *v.* Don Maus, 34 Ill. 457; Pentz *v.* Kuester, 41 Mo. 450; Hancock *v.* Lopez, 53 Cal. 362; Linehan *v.* Hathaway, 54 Cal. 251; Jenkins *v.* Fahey, 73 N. Y. 355.

which every person, whether in being or not, may be bound by such determination.

Of course, a judgment in partition is, to the same extent as every other judgment, restricted in its effect to the parties over whom the court acquired jurisdiction; and while there are provisions in the statutes of many of the states authorizing the proceeding to be taken against unknown owners, and under proper allegations to bring before the court every person who has any interest in the property, whether specially named or not, still, where this proceeding is not resorted to, and the court has not acquired jurisdiction over persons not named in the complaint or process, doubtless they will not be affected by the judgment. But as to the persons who are brought before the court, the judgment is conclusive of every issue necessary to its support. As already stated, all questions of title or possession may be put in issue and finally determined.[1] The judgment in a suit finally partitioning land establishes the title to the land partitioned, and is conclusive upon every adverse claim of title or of possession existing at the date of its rendition, and held by any of the parties to the suit. The law requires the court to ascertain and determine the rights of the parties, and makes it the duty of parties to disclose their adverse claims. The decree necessarily affirms that the parties named therein, who are thereby adjudged to hold undivided interests in the property, are tenants in common, joint tenants, or coparceners, and, as such, the exclusive owners of the property of which partition is made.[2] If the land is set off or is sold, the purchaser or the party to whom it is set off becomes thereby vested with the title held by all the parties

[1] Godfrey *v.* Godfrey, 17 Ind. 6; 79 Am. Dec. 448; De Uprey *v.* De Uprey, 27 Cal. 329; 87 Am. Dec. 81.

[2] Bobb *v.* Graham, 89 Mo. 200; Forder *v.* Davis, 38 Mo. 107; Clapp *v.* Bromagham, 9 Cow. 569; Jordan *v.* Van Epps, 85 N. Y. 427; Stean *v.* Anderson, 4 Harr. (Del.) 209; Freeman on Cotenancy and Partition, sec. 531; Burghardt *v.* Van Dusen, 4 Allen, 374; Herr *v.* Herr, 5 Pa. St. 428; 47 Am. Dec. 416; Dixon *v.* Warters, 8 Jones, 449; Rabb *v.* Aiken, 2 McCord Ch. 119; Linehan *v.* Hathaway, 54 Cal. 251; Burroughs *v.* De Couts, 70 Cal. 361; L'Hommedieu *v.* Cincinnati etc. R. R. Co., 120 Ind. 435; Luntz *v.* Greve, 102 Ind. 173.

to the suit.[1] If one is made a party defendant under an allegation that he claims some interest in the property, the nature of which is to the plaintiff unknown, and he fails to answer, and a judgment is entered declaring other persons to be the owners of the property, and partition is made accordingly, he is estopped by the judgment, and cannot afterwards show that he was a co-tenant, and that a portion of the land ought to have been set apart to him.[2] If a judgment in partition is entered in an action between A and B, declaring the former to be the owner of one third and the latter of two thirds of the premises, A cannot disregard this judgment, and maintain a second action, upon the theory that the two thirds were held by B and his wife as tenants by entireties. It is true that the former judgment is not binding upon the wife, because she was not a party to it, but it is binding upon both A and B, and neither can collaterally assail it.[3] A decree in partition is conclusive that at its rendition the lands set off to one of the parties, with a spring thereon, were held in common by the parties prior to the judgment.[4] The fact that a party is described as having a particular interest will not prevent the judgment from affecting a different interest, if such he had. As the object of the proceeding is to make a final partition of the property, it is unreasonable to suppose that when one is alleged to have a particular interest he is made a party with respect to that interest only, or is left free to avoid the partition by subsequently asserting another interest. Hence if a widow is made a party under the allegation that she is entitled to dower, she cannot after judgment assert a right to a homestead,[5] and if by the judgment she is awarded an interest as heir only, she cannot afterwards successfully claim dower.[6] But if one of the co-tenants is in-

[1] Hart *v.* Steedman, 98 Mo. 452; Crane *v.* Kimmer, 77 Ind. 215; Janes *v.* Brown, 48 Iowa, 568; Cooper *v.* Baston, 89 Ind. 185; Oliver *v.* Montgomery, 39 Iowa, 601.

[2] Morenhaut *v.* Higuera, 32 Cal. 290.

[3] Hanna *v.* Scott, 84 Ind. 71.

[4] Edson *v.* Munsell, 12 Allen, 600.

[5] Wright *v.* Dunning, 46 Ill. 271; 90 Am. Dec. 287.

[6] Jordan *v.* Van Epps, 85 N. Y. 427. Nor will she be any the less

debted to the other for purchase-money, and the fact of such indebtedness is not drawn in question in the suit for partition, the judgment therein, it has been held, does not estop the creditor co-tenant from maintaining an equitable ejectment to enforce payment of such purchase-money.[1]

If either of the parties acquires any new interest in the property during the pendency of the suit, the authorities appear to require him to assert it by a supplemental pleading; and if he permits a final judgment to be entered without so asserting, he is barred by such judgment, to the same extent as if such interest had been vested in him at the commencement of the suit.[2]

§ 305. **Partition — Judgment in Favor of One not in Possession.** — Though a statute authorizes a partition to be sought only by some one in possession, yet the fact of possession is not a jurisdictional fact, in the absence of which the action of the court is void. If all the parties in interest are brought before the court, its decree will be binding, until vacated or reversed, though the applicant was not one of the parties authorized by law to ask for a partition.[3] A tenant in common of a vested remainder may, while the tenant for life is in possession, maintain an action for partition.[4]

§ 306. **Partition — Persons not in Esse.** — In proceedings for partition, as well as in other actions affecting realty, it is sufficient to bring into court the person entitled to the first estate of inheritance with those claiming prior interests, omitting all claiming or who may claim in reversion or remainder after the vested inheritance. The decree will therefore pass a title free from any claims

bound if the pleadings seem to regard her as a child rather than as a widow of a deceased owner: Woodward *v.* Elliott, 27 S. C. 368.

[1] McClure *v.* McClure, 14 Pa. St. 134.

[2] Christy *v.* Spring Valley Water Co., 68 Cal. 73; 84 Cal. 541; Holladay *v.* Langsford, 87 Mo. 577; Bobb *v.* Graham, 89 Mo. 207.

[3] Blakeley *v.* Calder, 15 N. Y. 617.

[4] Mead *v.* Mitchell, 17 N. Y. 210; 72 Am. Dec. 455; Clemens *v.* Clemens, 37 N. Y. 59.

which might otherwise subsequently vest in persons not *in esse* at the time of its rendition.[1] An English case recognizes an exception to this principle of virtual representation by denying its applicability in cases where the person seised in fee is liable to have his seisin defeated by a conditional limitation or an executory devise, because in that event the estate is insufficiently represented by the person holding the first vested estate of inheritance.[2] This exception is repudiated so far as it seems to be noticed in the United States.[3] But if the proceedings in partition make no reference to the contingent interests of persons not in being, and the judgment does not provide for "and protect such interests by substituting the fund derived from the sale of the land in place of the land, and preserving it to the extent necessary to satisfy such interests as they arise," they are not, at least in New York, concluded by the final judgment.[4]

§ 307. **Partition — Unknown Owners.** — Under statutes providing that proceedings in partition may be prosecuted against unknown owners, a decree regularly obtained is conclusive, in the absence of fraud or collusion, of the claims of *a party in possession claiming in severalty*, who was only a party to the proceeding under the general designation of unknown owners. By failing to answer, he admits that the land is held in common, and that the petitioners are entitled to have it partitioned.[5]

§ 308. **Conclusive without Deed of Partition.** — A judgment in partition, under the statute, is final between the

[1] Wills *v.* Slade, 6 Ves. 498; Gaskell *v.* Gaskell, 6 Sim. 643; Nodine *v.* Greenfield, 7 Paige, 544; 34 Am. Dec. 363; Cheeseman *v.* Thorne, 1 Edw. Ch. 629. See sec. 172.

[2] Goodess *v.* Williams, 2 Younge & C. 595.

[3] Mead *v.* Mitchell, 17 N. Y. 210; 72 Am. Dec. 455; Brevoort *v.* Brevoort, 70 N. Y. 136.

[4] Monarque *v.* Monarque, 80 N. Y. 320. See also McArthur *v.* Scott, 113 U. S. 340.

[5] Cook *v.* Allen, 2 Mass. 461; Nash *v.* Church, 10 Wis. 303; 78 Am. Dec. 678; Kane *v.* Rock River Co., 15 Wis. 179; citing Kester *v.* Stark, 19 Ill. 328; Foxcroft *v.* Barnes, 29 Me. 128; Rogers *v.* Tucker, 7 Ohio St. 417; Pfeltz *v.* Pfeltz, 1 Md. Ch. 455; Reese *v.* Holmes, 5 Rich. Eq. 531.

parties, and is conclusive evidence of title, without the execution of any deeds either by the parties or by commissioners;[1] and the interlocutory decree, until set aside or modified in some direct proceeding, is also "final and conclusive as to the nature and extent of the rights of the respective parties to it. If the parties choose to stop with a decree ascertaining their rights, and not to proceed to partition in fact, it is not perceived why their neglect to take the latter should render the former step ineffectual."[2]

§ 308 a. **Partition of Lands of Decedents.** — Under statutes in force in many of the states, when the estate of a decedent has been fully administered upon and the obligations against it discharged, and it is ascertained that a residue remains to which several persons are entitled as his heirs or devisees, proceedings may be had in the court having jurisdiction over the administration of the estate to partition such residue among the parties entitled thereto, either by allotting to each a parcel thereof equivalent in value to his interest in the estate, to be held in severalty, or by selling the whole and distributing to each his share of the proceeds.

The application may be made by any one entitled to the partition. If the person entitled is a minor, he may apply by his guardian; if a married woman, her husband may petition in her right.[3] If any of the heirs has conveyed, his grantee is entitled to petition for partition.[4] In Pennsylvania the application may be by the widow of an heir who had an estate in remainder after the life of his mother, who dies before the petition was filed,[5] and may probably also be by a tenant for life.[6]

A petition or application in writing is essential, and a partition will be adjudged void unless such written

[1] Wright *v.* Marsh, 2 G. Greene, 94; Barney *v.* Chittenden, 2 G. Greene, 165.

[2] Allie *v.* Schmitz, 17 Wis. 169.

[3] Eckert *v.* Yous's Adm'r, 2 Rawle, 136.

[4] Stuart's Appeal, 56 Pa. St. 241; De Castro *v.* Barry, 18 Cal. 99; Manly's Estate, 1 Ashm. 363.

[5] Cote's Appeal, 79 Pa. St. 235.

[6] Rankin's Appeal, 95 Pa. St. 358.

petition is established, except when the proceedings are drawn in question after the lapse of so great a period of time that the court may reasonably presume that such petition existed in due form, but has been lost.[1] In most of the states the statutes are either wholly silent or else speak in general and vague terms respecting the contents of the petition for partition. Where any petition is required, it seems to be obvious that it ought to at least set forth the facts upon which the court is called to act sufficiently to inform the court of the names of the parties, so far as known,[2] the respective moieties and interests of each, and the property sought to be divided among them.

The parties to the proceeding must include all persons having any interest in the property derived from and under the decedent, and if any of such persons are not made parties, whether infants or adults, their interests cannot be affected by the partition.[3] By property derived from and under the decedent we mean such only as is acquired from him by descent, devise, or bequest; for if he in his lifetime conveyed the property, or any part of it, the part so conveyed constitutes no part of his estate in probate, and cannot be there partitioned.[4] If any of the heirs or devisees has conveyed his share, the conveyance may be recognized and protected, and the part conveyed set off to his grantee;[5] and a conveyance made during the pendency of the proceedings does not impair the force of the partition.[6] A known vendee must be made a party, or the proceedings will not affect his interests.[7]

The questions which may be litigated and determined are restricted by the limited jurisdiction of the court, and in some of the states by the manifest fear that the jurisdiction cannot be safely exercised in any but the most

[1] Brown *v.* Sceggell, 22 N. H. 548.
[2] Ragan's Estate, 7 Watts, 438; Richards *v.* Rote, 68 Pa. St. 248.
[3] Whitman *v.* Reese, 59 Ala. 532.
[4] Dresher *v.* A. W. Co., 52 Pa. St. 225; 91 Am. Dec. 150.
[5] Vt. Stats. 1880, sec. 2257; Estate of Castro *v.* Barry, 18 Cal. 96; Wis. Rev. Stats., sec. 3945; Howell's Mich. Stats., sec. 5970.
[6] Cook *v.* Davenport, 17 Mass. 345.
[7] Butler *v.* Roys, 25 Mich. 53; 12 Am. Rep. 218; Thompson *v.* Stitt, 56 Pa. St. 156.

simple cases. The jurisdiction is only ancillary to the settlement of the estate of the decedent, and therefore does not extend over moieties and interests held by others,[1] unless specially included by statute. In some of the states, if the decedent was a co-tenant with others, the court is given authority to set off his share from that of the living co-tenants;[2] and in others, the court may proceed to make complete partition between a decedent and his surviving co-tenants.[3] Sometimes the court is authorized to act only when the shares or interests of the parties are not in dispute, or do not seem uncertain.[4] In such cases the jurisdiction of the court is not ousted or suspended by the mere claim of one of the parties that there is a dispute or uncertainty. "To deprive the probate court of its jurisdiction in a matter of this kind in any particular case, it must be made to appear that there is a real doubt and uncertainty in relation to the legal rights of the parties. The mere fact that they do not agree what those rights are, or that they are in controversy in respect to them with each other, is not of itself sufficient and conclusive. It must first be by some means affirmatively and satisfactorily shown that there is an actual dispute and uncertainty concerning their shares or proportions, which can be definitely determined only by submitting some controverted question of fact to a jury, or some doubtful and contested question of law to a legal tribunal competent to decide it. If the facts in reference to which the alleged dispute or uncertainty arises are all known to and expressly admitted by the parties, and the law applicable thereto is clearly settled and established, and if these show that the court has jurisdiction, it is the duty of the judge to proceed and cause the partition to be made, although one of the parties should insist that there is dispute and controversy con-

[1] Romey's Appeal, 8 Watts, 415.

[2] Vt. Stats. 1880, sec. 2259; Mass. Stats. 1882, p. 1035, sec. 60.

[3] Tex. Stats. 1879, sec. 2132; Brightly's Purdon's Dig., p. 538, sec. 152; Stewart *v.* Alleghany Bank, 101 Pa. St. 342.

[4] Me. Stats. 1883, p. 550, secs. 8, 9; Kelley *v.* Kelley, 41 N. H. 503; Gage *v.* Gage, 29 N. H. 533; Mass. Stats. 1882, p. 1035, sec. 59.

cerning their relative shares and proportions of the estate."[1] If, after the court has assumed jurisdiction and appointed commissioners, there arises a dispute or uncertainty, the court will proceed with the partition.[2] The fact that the decedent did not die seised of the lands sought to be partitioned sometimes ousts the court of its jurisdiction.[3] As the proceeding is merely ancillary to the settlement of the estate of a decedent, it manifestly cannot involve any title not held by him, nor determine the title of one of the heirs who claims to be the sole owner of the property.[4] Generally, questions of title, so far as they can arise in probate proceedings, are disposed of before the commissioners are appointed to make partition. The decree of distribution conclusively fixes the share of each heir or devisee in the estate of his ancestor or testator,[5] and the office of the proceeding for partition is merely to segregate the shares so fixed, and transform them from undivided interests to estates in severalty.

Jurisdiction over the persons whose interests are sought to be affected by the proceeding is here, as elsewhere, indispensable to the validity of the partition. This jurisdiction is not established by the original proceeding, wherein the grant was made of letters testamentary or of administration, nor yet by the proceeding for the distribution of the estate in undivided moieties. It must be brought into being by some kind of notice to the parties interested, designed to advise them of the fact that the interests which exist in common and undivided are about to be segregated into estates in severalty. The contents of the notice and the modes of its service may be as prescribed by statute, or the court may be vested with a discretion to designate the form of the notice and the mode of its service. But notice, as prescribed by the

[1] Dearborn *v.* Preston, 7 Allen, 192.

[2] Potter *v.* Hazard, 11 Allen, 187.

[3] Law *v.* Patterson, 1 Watts & S. 184; Galbraith *v.* Green, 13 Serg. & R. 93; McMasters *v.* Carothers, 1 Pa. St. 324.

[4] Eell's Estate, 6 Pa. St. 457.

[5] In re Garraud, 36 Cal. 277; Freeman *v.* Rahm, 58 Cal. 111.

statute or the order of the court, is essential, and if any person has been proceeded against in the absence of such notice, the proceeding is, as against him, a mere nullity.[1] The statutes of Minnesota and California declare that "before commissioners are appointed, or partition ordered by the court, notice thereof must be given to all persons interested who reside in this state, or to their guardians, and to the agents, attorneys, or guardians, if any in this state, of such as reside out of the state, either personally or by public notice, as the court may direct."[2] In Pennsylvania, notice to all persons named in the record is presumed.[3]

When land has been awarded to one of the heirs on payment of a sum of money, the payment must be made or secured in the manner designated by statute before the title vests in such heir.[4] In Pennsylvania, the security must be, by recognizance or otherwise, to the satisfaction of the court. "When security by recognizance is taken, it operates as a lien on the lands."[5] "The persons to whom or for whose use payment or satisfaction shall be so made, in any of the cases aforesaid, for their respective parts or shares of such real estate, shall be forever barred of all right or title to the same."[6]

Proceedings for partition in connection with the settlement of the estates of deceased persons must, upon principle, be regarded as binding and conclusive to the same extent as other legal proceedings. When the court has jurisdiction of the subject-matter, and of the persons of

[1] Breese *v.* Stiles, 22 Wis. 120; Ruth *v.* Oberbrunner, 40 Wis. 238, 269; Richards *v.* Rote, 68 Pa. St. 248; Smith *v.* Rice, 11 Mass. 507; Brown *v.* Leggett, 22 N. H. 548; Wood *v.* Myrich, 16 Minn. 494; Proctor *v.* Newhall, 17 Mass. 81.

[2] Cal. Code Civ. Proc., sec. 1676; Minn. Comp. Stats., ed. 1878, p. 597, sec. 8. See also Mass. Gen. Stats. 1882, p. 1034, sec. 51; Wis. Rev. Stats., sec. 3944.

[3] Richards *v.* Rote, 68 Pa. St. 248; Vensel's Appeal, 77 Pa. St. 71.

[4] Thayer *v.* Thayer, 7 Pick. 209; Jenks *v.* Howland, 3 Gray, 536; Bavington *v.* Clark, 2 Penr. & W. 115; 21 Am. Dec. 432; Smith *v.* Scudder, 11 Serg. & R. 325; Bellas *v.* Evans, 3 Penr. & W. 479.

[5] Kean *v.* Franklin, 5 Serg. & R. 147; Share *v.* Anderson, 7 Serg. & R. 43; 10 Am. Dec. 421; Cubbage *v.* Nesmith, 3 Watts, 314; Riddle's Appeal, 37 Pa. St. 177.

[6] Brightly's Purdon's Dig., p. 541, sec. 162; Merklein *v.* Trapnell, 34 Pa. St. 42.

its owners, its final judgment operates to vest the title to the several allotments in the persons to whom they are respectively allotted. "There is no reason why a decree of partition in the probate court should be any less conclusive upon the parties than a judgment in a real action. To permit one claiming under a party to such partition again to litigate the title would manifestly violate the maxim which declares that public interest requires an end to litigation."[1] All the incidents and appurtenances of each allotment vest in the person to whom it is assigned. "Unless there be some reservation or order made by the committee, the buildings, fences, trees, stone, manure, etc., that are upon one part go to him to whom that part is assigned";[2] and his title is paramount to any conveyance or encumbrance made by any of his co-heirs.[3] The partition is binding on minors, and cannot be disaffirmed by them on attaining their majority.[4] It may, in some states, be impeached for fraud. Thus in *Mitchell* v. *Kintzer*,[5] the supreme court of Pennsylvania, in determining that evidence ought to have been received to impeach a partition for fraud, said: "The evidence so offered by defendant was rejected by the court below, and the learned counsel for Kintzer contended here that the court below were right, because the proceedings and decree of the orphans' court could not be impeached by parol, or for any cause, but imported absolute verity, and vested the title in James Mitchell and his heirs, irrespective of and beyond all the circumstances which might have attended the transaction. But in the eye of the law, fraud spoils everything it touches. The broad seal of the commonwealth is crumbled into dust, as against the interest designed to be defrauded. Every transaction between individuals in which it mingles is corrupted by its contagion. Why, then, should it find shelter in the decrees of courts? There is

[1] Carpenter *v.* Green, 11 Allen, 28; Mass. Stats. 1882, p. 1036, sec. 63; Howell's Mich. Stats., sec. 5980.

[2] Plumer *v.* Plumer, 30 N. H. 570.

[3] Street's Appeal, 86 Pa. St. 222; Holcomb *v.* Sherwood, 29 Conn. 418.

[4] Gelbach's Appeal, 8 Serg. & R. 295.

[5] 5 Pa. St. 217; 47 Am. Dec. 408.

the last place on earth where it ought to find refuge. But it is not protected by record, judgment, or decree; whenever and wherever it is detected, its disguises fall from around it, and the lurking spirit of mischief, as if touched by the spear of Ithuriel, stands exposed to the rebuke and condemnation of the law." The rhetoric of this quotation is quite striking. In other respects, we are obliged to refuse it our condemnation. A decree partitioning the property of a decedent is, doubtless, neither more nor less subject to collateral impeachment for fraud than is a decree in any other proceeding in which a court has jurisdiction both of the parties and of the subject-matter, and the general rule is, that the parties to an action or proceeding cannot collaterally impeach it, even for fraud.

§ 309. **Action to Quiet Title.** — If the defendant recovers judgment on the merits, in a proceeding to quiet title under the statute authorizing suits to determine conflicting claims to real estate, the fact that he *has a title* is as conclusively established as a judgment in favor of the plaintiff would have established that defendant had *no title*.[1] If the judgment is in favor of the plaintiff, and declares that he has title in fee-simple, and that the defendant's claim is unjust and unfounded, every possible interest of the latter in the land is cut off.[2] The defendant cannot successfully assert, notwithstanding such judgment, that he has an easement in the land, to wit, the right to construct or maintain a railway over it.[3] No matter what is the form of the judgment, it is conclusive of the facts declared by it, and within the issues, and of all other facts without which the facts so declared could not exist, or the relief granted could not be sustained. If the object of the action was to declare invalid certain tax deeds, a judgment granting the relief asked is conclusive not only

[1] Parrish *v.* Ferris, 2 Black, 606.

[2] Davis *v.* Lennan, 125 Ind. 185; Commissioners *v.* Welch, 40 Kan. 767; Farrar *v.* Clark, 97 Ind. 447; Goodenow *v.* Litchfield, 59 Iowa, 226.

[3] Indiana, B., & W. R'y Co. *v.* Allen, 113 Ind. 581, 308.

of the invalidity of such deeds, but also of plaintiff's ownership of the property, because, unless he was such owner, he had no right to a decree against the tax deeds.[1] So if the complainant asserts title by virtue of a will, asking that it be construed and his title thereunder declared perfect, and judgment is pronounced in his favor, the defendant cannot by a subsequent suit have the same will set aside upon the ground of the mental unsoundness of the testator.[2]

An action was brought to quiet title based upon two inconsistent grounds. The court ordered plaintiff to elect upon which of these grounds he would proceed. He made such election, prosecuted his action to judgment, and was defeated. He next commenced another action, based upon the ground which he had abandoned under the order of the court in the former litigation. The former judgment was relied upon as a bar, and was so considered by the judge, because, under the statute authorizing a suit to ascertain and quiet the title of the parties, "the plaintiff cannot, at his option, split it up into many suits with which to harass and weary the defendant. By the final decree in such a suit, the title to the premises, as between the parties, is determined, and all questions or matters affecting such title are concluded thereby. If either party omits to set forth and prove all the grounds of his right, or his adversary's want of it, he cannot correct his error by bringing another suit upon the portion or fragment of the case omitted."[3]

Under an act of the legislature of Louisiana "for the further assurance of purchasers at judicial sales," the purchaser of property may apply to the clerk of the court in whose office the deed of sale was recorded for a monition or advertisement and "praying that process may be granted requiring all parties alleging any informality or irregularity in the sale to show cause, if any they have,

[1] Reed *v.* Douglas, 74 Iowa, 244; 7 Am. St. Rep. 476.

[2] Faught *v.* Faught, 98 Ind. 470.

[3] Starr *v.* Stark, 1 Saw. 275, by Judge Deady.

why the sale shall not be confirmed and homologated." If advertisements in conformity with this act are duly published, and no opposition being made, the court confirms and homologates the sale, "it is clear that the judgment in the monition proceeding affords conclusive proof that the judicial conveyance of the property vested a complete title in the purchaser at the sheriff's sale."[1] The dismissal of a bill to remove a cloud from the complainant's title, or to cancel some deed or evidence of title held by the defendant, by no means establishes that the latter has or that the complainant has not a good title; for the dismissal may have proceeded either on the ground that the alleged deed or other matter was in law no cloud upon the complainant's title, or that the controversy between the parties was one which ought to be determined in a court of law.[2]

JUDGMENTS IN ACTIONS OF TRESPASS ON REAL ESTATE.

§ 310. **First — In Like Actions.** — It seems to be generally, if not universally, conceded that where one has maintained trespass *quare clausum fregit* against another, and afterward sues for a subsequent trespass, the former recovery is conclusive in reference to the title set up to the premises at the time of such recovery, and the defendant can offer in evidence no title not acquired by him since the previous suit.[3] "A recovery in any one suit upon issue joined on matter of title is clearly conclusive upon the subject-matter of such title; and a finding upon title in trespass not only operates as a bar to the future recovery of damages for the trespass founded on the same injury, but also operates by way of estoppel to another action for an injury to the same subject right of possession. It is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, that creates the estoppel. The estoppel in trespass precludes

[1] Montgomery *v.* Samory, 99 U.S. 482.
[2] Phelps *v.* Harris, 101 U. S. 370; 12 Chic. L. N. 326.
[3] Bert *v.* Sternburgh, 4 Cow. 559; 15 Am. Dec. 402.

parties and privies from contending to the contrary of that point of fact which, having once been put in issue, has been solemnly found."[1] A judgment in trespass, grounded upon the theory that the land described in the pleadings is within the boundaries of one of the parties, is conclusive upon that question in any other action of trespass between the same persons.[2] Some cases, however, proceed upon the theory that in order to make a judgment in trespass conclusive of *title* even in another action of trespass, the title must have been placed in issue by plea of soil and freehold, or by some other equivalent plea.[3]

In Massachusetts an action on the case for the interruption of lights or other easements, tried upon the general issue, does not affect the title. But if the defendant pleads title in bar, and issue is taken on it, the verdict will be conclusive in subsequent controversies.[4] In the same state a judgment in an action for the obstruction of a private way, on the general issue, is admissible, but not conclusive, evidence in a subsequent suit for the continuance of the same obstruction.[5] In an action for overflowing lands, occasioned by a mill-dam, a former recovery between the same parties is conclusive as to the title of the land, so far as it was involved in the former suit.[6] When it has been adjudged that defendant has no right to flow plaintiff's land without paying damages therefor, he cannot, in a subsequent suit to increase the annual rent, show a right by prescription or by grant prior to the former judgment.[7] Judgment for plaintiff in an action of trespass, in which the defendant denied the trespass, and set up that he had a right of way over the land, is, in Massa-

[1] Outram *v.* Morewood, 3 East, 346; Illinois etc. R. R. Co. *v.* Cobb, 82 Ill. 183; Campbell *v.* Cross, 39 Ind. 155; Bowyer *v.* Schofield, 1 Abb. App. 177.

[2] Warwick *v.* Underwood, 3 Head, 238; 75 Am. Dec. 767.

[3] Potter *v.* Baker, 19 N. H. 166; Stevens *v.* Hughes, 31 Pa. St. 383.

[4] Standish *v.* Parker, 2 Pick. 20; 13 Am. Dec. 392.

[5] Parker *v.* Standish, 3 Pick. 288; Kent *v.* Gerrish, 18 Pick. 564.

[6] Jones *v.* Weathersbee, 4 Strob. 50; 51 Am. Dec. 653; Kilheffer *v.* Herr, 17 Serg. & R. 319; 17 Am. Dec. 658.

[7] Adams *v.* Pearson, 7 Pick. 341; 19 Am. Dec. 290, and note.

chusetts, not conclusive that defendant had no right of way, but only that he had trespassed on some portion of plaintiff's land.[1]

§ 311. **Second — In Actions in Ejectment.** — In Pennsylvania, a recovery in an action of trespass *quare clausum fregit*, if the only plea is *liberum tenementum*, is not conclusive of the title in a subsequent action of ejectment for the same land.[2] But in South Carolina an opposite view is maintained. A defendant who, making such a plea, and setting forth his claim by metes and bounds, has a verdict and judgment in his favor may use this judgment as conclusive evidence of title in an action brought by him against the former plaintiff for the land included in the plea; for the judgment is equivalent to a finding that the title to the whole land included in the plea is the property of the defendant.[3] In New York, a recovery in trespass is as conclusive as a recovery in any other form of action. The reasoning used in support of this liberal rule is, that the matter of estoppel depends on the identity of the cause of action, and not on the identity of the form; that the causes of action are the same whenever they can be supported by the same evidence, though they may be founded on different writs.[4] In Massachusetts, a judgment for the plaintiff in an action of tort in the nature of trespass *quare clausum fregit* is perhaps never *conclusive* upon the title.[5] "But the trial of an action of trespass may turn upon the question of title, and if that question is put in issue, tried, and passed upon by the jury, or court, or a referee, the verdict or finding, and judgment following it, are competent evidence of that fact in a subsequent writ of entry between the same parties, even if it does not operate as a conclu-

[1] Howard *v.* Albro, 100 Mass. 236.

[2] Hoey *v.* Furman, 1 Pa. St. 295; 44 Am. Dec. 129; Sabins *v.* McGhee, 36 Pa. St. 453; McKnight *v.* Bell, 135 Pa. St. 358.

[3] Parker *v.* Leggett, 13 Rich. 171. See also Chambers *v.* Dollar, 29 U. C. Q. B. 606; Whittaker *v.* Jackson, 2 Hurl. & C. 926.

[4] Rice *v.* King, 7 Johns. 20; McKnight *v.* Dunlop, 4 Barb. 36; Campbell *v.* Cross, 39 Ind. 155.

[5] Arnold *v.* Arnold, 17 Pick. 4; Morse *v.* Marshall, 97 Mass. 519.

sive estoppel."[1] In Indiana, a recovery in an action of trespass upon title to land being put in issue, no judgment being rendered on such title further than it might be supposed to enter into the determination of the action, and no decision upon the title being essential to the judgment, is no bar to an action of ejectment.[2] "So where the declaration, in an action of trespass, or trespass on the case, for an injury to land, alleges that the plaintiff was well seised and possessed of the land as a good indefeasible estate in fee-simple, it is sufficient on the trial for the plaintiff to show a lawful possession at the time when the injury was committed. And a judgment for the plaintiff in such a case, upon a general issue, is conclusive evidence between the parties and their privies only of such title as the plaintiff was bound to prove."[3] The fact that a judgment is entered for nominal damages does not depreciate its effect as *res judicata*.[4]

While it is not possible to reconcile all the decisions upon this subject, perhaps the greater portion of them are not as conflicting as they at first seem to be. In the great majority of actions of trespass, the issues in effect tried and determined are, whether the plaintiff's possession has been invaded, and what damages, if any, have resulted from such invasion; and when such is the case, it is obvious that the judgment cannot affect the title, because title has not been considered nor determined, nor has any fact been affirmed necessarily establishing or disproving the title of either party; and certainly, unless it affirmatively appears that the title was drawn in question and decided, and that its decision was necessary, a judgment will not be treated as concluding either party upon the question of title;[5] and that the title cannot, in some of the states, be regarded as in issue, except upon a special plea of soil, or freehold, or some other equivalent

[1] White *v.* Chase, 128 Mass. 158.
[2] Hargus *v.* Goodman, 12 Ind. 629.
[3] 1 Hilliard on Torts, 498; Parker *v.* Hotchkiss, 25 Conn. 321.
[4] Casler *v.* Shipman, 35 N. Y. 533.
[5] Masten *v.* Olcott, 101 N. Y. 153; Hargus *v.* Goodman, 12 Ind. 629.

pleading;[1] but that when such plea is interposed, or when without any special plea the rules of practice in the state permit the title to be received in evidence and to be considered by the court or jury, and it is in fact received, considered, and made the basis of a verdict and judgment, then that is as conclusively settled as if it had been drawn in question and decided in some other action.[2] In Michigan, it is insisted that a judgment in trespass cannot, under any circumstances, operate as an estoppel in an action of ejectment, because a single judgment in ejectment is not there conclusive of title, and it would be unreasonable to give a higher effect to a judgment in trespass than to one in ejectment.[3]

The action commonly known as trespass to try title is, as the name implies, one in which the title may be put in issue and determined, and a judgment for or against either party is conclusive upon all issues determined by it, and precludes each from afterwards showing that the title was different from that which the judgment in effect asserted it to be.[4]

§ 312. **Suits for Breach of Warranty.** — The successful prosecution of an action for a breach of warranty of a contract necessarily affirms, for all future actions, the making of the contract.[5] A judgment for the defendant in an action of tort for a false representation of the soundness of a horse is a bar to a subsequent action of contract on the defendant's promise, at the time of the exchange, that the horse was sound.[6] P. brought an action in chancery to set aside a sale and to enjoin the

[1] Stapleton *v.* Dee, 132 Mass. 279.

[2] Dunckle *v.* Wiles, 5 Denio, 296; Rogers *v.* Ratcliff, 3 Jones, 225; Stapleton *v.* Dee, 132 Mass. 279; Shettlesworth *v.* Hughey, 9 Rich. 387; Moran *v.* Mansur, 63 N. H. 377; Parker *v.* Leggett, 13 Rich. 171; White *v.* Chase, 128 Mass. 158.

[3] Keyser *v.* Sutherland, 59 Mich. 455; Dennison *v.* Genesee Circuit Judge, 37 Mich. 285; Rice *v.* Auditor-General, 30 Mich. 13.

[4] Caston *v.* Perry, 1 Bail. 533; 21 Am. Dec. 482; Fisk *v.* Miller, 20 Tex. 579; Hall *v.* Wooters, 54 Tex. 231; Spence *v.* McGowan, 53 Tex. 30; Graves *v.* Campbell, 74 Tex. 576; Thompson *v.* Lester, 75 Tex. 521.

[5] Barker *v.* Cleveland, 19 Mich. 230.

[6] Norton *v.* Doherty, 3 Gray, 372; 63 Am. Dec. 578.

collection of the purchase-money, on the ground of fraud practiced by the vendor in making the sale. Failing in chancery, he commenced suit at law to recover damages for breach of warranty. It was held that the issues in the two actions were different; that while, as affirmed by the judgment in chancery, the vendor may not have been guilty of fraud, it nowise necessarily followed that he did not make a contract of warranty, nor that such contract, if made, was not broken.[1] In an action for breach of warranty of the character, quality, or quantity of goods sold, if it is conceded that the contract was made by the parties, and has been fulfilled by the vendee, but broken by the vendor, the issue presented to the court or jury is, What are the damages occasioned by the breach of the vendor's warranty? These damages must be estimated the same, whether the purchase-money has been paid or not. After a recovery by the vendee, the vendor may maintain an action for the whole of the purchase-money, if it has not been paid. The effect of the judgment for the vendee in his action for breach of warranty is to establish the making of the contract, and that the vendor has suffered in a prior suit all damages sustained for its non-performance.[2] If a party proceeds upon the theory that a contract has been totally rescinded by the failure of a vendor to perform his part thereof, the judgment is conclusive on the vendee of all damages suffered by him, including an amount advanced on the contract, and equally conclusive against the vendor of the abrogation of the contract, and of his right to recover any sum stipulated for its performance.[3] If a warrantee recovers and has satisfaction of his warrantor on his covenant to warrant the title to real estate, he cannot afterwards regain possession of the land from the warrantor on that deed. He is estopped by the judgment procured in his

[1] Pleasants *v.* Clements, 2 Leigh, 474.
[2] Barker *v.* Cleveland, 19 Mich. 230; Perrine *v.* Serrell, 30 N. J. L. 453.
[3] Barker *v.* Cleveland, 19 Mich. 230; Freeman *v.* Clute, 3 Barb. 424.

own behalf, and which proceeds upon the theory that the deed did not convey the title.[1]

§ 313. **Divorce.** — One who brings a bill for divorce, which, upon a trial on the merits, he fails to sustain, cannot afterward proceed for the same offense,[2] though the decree simply dismisses his bill.[3] "A libel for divorce from the bonds of matrimony and a libel for divorce from bed and board are proceedings having a direct and intimate relation to each other. They seek for different degrees of change in the married relation, and concern the same subject-matter."[4] In this case "the libelant in the first suit asked a decision of the court upon the question whether she had been so cruelly treated as to justify a judicial sentence of separation from her husband; and the judgment given was that she was not. This judgment was plainly a bar to any new application from bed and board, upon the same ground up to that time, whether upon the same or different evidence"; and it is also a bar to the more complete remedy of divorce from the bonds of matrimony. "A sentence of divorce necessarily affirms the marriage, and no proceeding can afterward be had to declare the marriage void *ab initio*."[5] A decree of divorce, so far as it affects the *status* of the parties, is considered as a judgment *in rem*, and if free from fraud and collusion, is binding on the whole world.[6] But except in relation to the *status* of the parties, it is subject to the usual rule that estoppels must be mutual, and does not conclude any third person in reference to the facts which it necessarily affirms or denies. A decree dismissing a bill for divorce, sought on the ground of alleged adultery of a wife, is not evidence against the husband that the wife did not commit adultery

[1] Porter *v.* Hill, 9 Mass. 34; 6 Am. Dec. 22; Winslow *v.* Grindal, 2 Greenl. 64.

[2] 2 Bishop on Marriage and Divorce, sec. 766.

[3] Thurston *v.* Thurston, 99 Mass. 39; Brown *v.* Brown, 37 N. H. 536; 75 Am. Dec. 154.

[4] Fera *v.* Fera, 98 Mass. 155.

[5] 2 Bishop on Marriage and Divorce, sec. 765; Mayhew *v.* Mayhew, 3 Maule & S. 266.

[6] 2 Bishop on Marriage and Divorce, secs. 755, 756.

prior to the petition for divorce or during its pendency, in an action against him for necessaries furnished to her during their separation. So far as the parties to this action are concerned, the matter is not *res judicata*. The judgment in the divorce suit not being binding on the plaintiff in this suit, he cannot avail himself of it for the purpose of binding the defendant.[1]

If a husband files a bill for divorce on the ground of desertion, and the wife by her answer justifies the desertion on the ground of cruelty and other grounds sufficient to entitle her to a divorce, and also files a cross-bill making the same allegations and praying for separate maintenance, and the issues upon the husband's bill are tried before a jury and a verdict given against him, this verdict is not conclusive in her favor upon her cross-bill for maintenance, because the verdict against the husband may have been upon the ground that his wife's abandonment of him was by their mutual consent.[2] So the dismissal of a bill by a married woman for reasonable support and maintenance is not conclusive against her upon a bill filed against her by her husband charging her with willful and continuous desertion without any reasonable cause; for though the former judgment may establish that her living apart from him was not without her fault, still it does not establish that she willfully deserted and absented herself without reasonable cause.[3] But upon such issues as are necessary to support it, a judgment granting or denying a divorce is not less conclusive than any other judgment.[4] If the complaint charges the defendant with committing adultery at various times, between certain designated dates, and with

[1] Gill *v.* Read, 5 R. I. 343; 73 Am. Dec. 73. In Maine a divorce procured by one of the spouses is no bar to an action for divorce subsequently brought by the other. Each may obtain a divorce from the other; or in other words, there may be two decrees dissolving the same marriage: Stilphen *v.* Houdlette, 60 Me. 447; 58 Me. 513.

[2] Wahle *v.* Wahle, 71 Ill. 510.

[3] Umlauf *v.* Umlauf, 117 Ill. 580; 57 Am. Rep. 880.

[4] Prescott *v.* Fisher, 22 Ill. 390; Slade *v.* Slade, 58 Me. 157; Kalisch *v.* Kalisch, 9 Wis. 529; Blain *v.* Blain, 45 Vt. 538.

different persons, some of whom are alleged to be unknown, a judgment for the defendant bars any other action based upon acts of adultery claimed to have been committed at or between those dates, but as to charges of offenses subsequent to the days named the defendant may be proceeded against.[1] If an action for divorce on a particular ground has been determined against plaintiff, he cannot, in an action brought against him, use as a defense the same acts upon which he relied as a cause of action in the former suit.[2]

While a judgment of divorce remains in force, it is conclusive evidence that the parties have ceased to be husband and wife, and therefore precludes any further action by either to procure a divorce from the other.[3] It deprives each of the parties of all rights dependent on their marital relations, though the cause of divorce is not one recognized in the state or country in which the judgment is offered in evidence.[4] An absolute divorce dissolves all marriage ties and destroys the relation of husband and wife as completely as if it had been terminated by death.[5] The wife becomes a *feme sole*,[6] and if she goes into her late husband's house, is an intruder who may be barred or put out.[7]

§ 314. **Alimony.** — The question of a proper allowance to the wife is one of the issues which should be litigated in the action of divorce. The decree is therefore conclusive on this subject, and the wife cannot afterwards maintain a suit to recover additional alimony.[8] In England the rule is otherwise; and the courts there can allow alimony on a petition filed after the decree of divorce.[9]

[1] Vance *v.* Vance, 17 Me. 203.

[2] Lewis *v.* Lewis, 106 Mass. 309.

[3] Hood *v.* Hood, 11 Allen, 196; 87 Am. Dec. 709; Cooper *v.* Cooper, 7 Ohio, 239.

[4] Roth *v.* Roth, 104 Ill. 35; 44 Am. Rep. 81; Ross *v.* Ross, 129 Mass. 248; 37 Am. Rep. 321.

[5] Hays *v.* Sanderson, 7 Bush, 489; State *v.* Weatherby, 43 Me. 258; 69 Am. Dec. 59; Hunt *v.* Thompson, 61 Mo. 148; Miltimore *v.* Miltimore, 40 Pa. St. 151; Porter *v.* Porter, 27 Gratt. 599.

[6] Piper *v.* May, 51 Ind. 283.

[7] Brown *v.* Smith, 83 Ill. 91; Merrill *v.* Merrill, 38 Mich. 707.

[8] Fischli *v.* Fischli, 1 Blackf. 360; 12 Am. Dec. 251.

[9] Covell *v.* Covell, L. R. 2 Pro. & D. 411.

§ 315. **Partnership.** — If a plaintiff obtains judgment against two as copartners, this is conclusive in a second action between the same parties of the fact of the partnership of the defendants.[1] And where defendants, being sued, pleaded in abatement the non-joinder of others, whom they claimed to be their copartners, and succeeded in maintaining their plea, the record in this suit is conclusive, in a subsequent action against those who interposed the plea in abatement, that the several persons were partners, as alleged in the plea.[2]

§ 316. **Replevin.** — In consequence of the rule that the conclusiveness of an adjudication is not affected by a change in the form of the action, one who has failed in replevin cannot subsequently maintain an action of trespass[3] or trover[4] for the taking of the same goods. A judgment in replevin designating the rights of the parties is as conclusive on an intervener as it is on the plaintiff or on the defendant.[5] A recovery in replevin is equally conclusive on the defendant, whether he took issue on the plaintiff's allegation of ownership or confined himself to a denial of the taking and detention.[6] A determination of the rights of property in a replevin suit is conclusive in an action on the replevin bond.[7] Judgment in replevin on plea of *non detinet*, accompanied by a notice that the goods were the property of the defendant, rendered on a special verdict, finding that defendant unlawfully detained the goods, but silent on the issue of property, is not conclusive on the title, where it does not appear from the record that the title was passed upon, because no decision in relation to title was essential to the judgment, a mere right of plaintiff to a lien being sufficient to support his action.[8] Whenever the defend-

[1] Dutton *v.* Woodman, 9 Cush. 255; 57 Am. Dec. 46.
[2] Witmer *v.* Schlatter, 15 Serg. & R. 150.
[3] Ewald *v.* Waterhout, 37 Mo. 602.
[4] Hardin *v.* Palmerlee, 28 Minn. 450; Claflin *v.* Fletcher, 10 Biss. 231.
[5] Witter *v.* Fisher, 27 Iowa, 9.
[6] Wells *v.* McClenning, 23 Ill. 409.
[7] Denny *v.* Reynolds, 24 Ind. 248; Ernst *v.* Hague, 86 Ala. 502.
[8] Board of S. *v.* M. P. R. R. Co., 24 Wis. 125.

ant is, under the pleadings, entitled to try the title and to have the property returned to him in case he succeeds, he is bound to present his evidence of title, and cannot seek his remedy by a cross-suit.[1] A judgment for the defendant, when he merely traverses plaintiff's complaint without asking for a return of the property, establishes either that plaintiff has no title or that the defendant does not unlawfully detain. In order to give proper effect to such a judgment, it must be shown *aliunde* on what grounds the court or jury proceeded in the former action.[2]

§ 317. **Trespass.** — Judgment for the defendant in an action for taking goods is a bar to a subsequent action of *assumpsit* for the value of the same goods.[3] The plea of not guilty, in an action of trespass *de bonis asportatis*, puts nothing in issue but the wrongful taking. The simple verdict of not guilty applies to the wrongful taking, and leaves the question of title unsettled.[4] A recovery by the defendant in an action on the case for cutting and carrying away wheat bars an action of trespass *quare clausum fregit* for the same cause.[5]

§ 318. **Criminal Cases and Former Jeopardy.** — The principles applicable to judgments in criminal cases are, in general, identical, so far as the question of estoppel is involved, with the principles recognized in civil cases. An acquittal or a conviction, under an indictment for any offense, is a bar to any subsequent indictment substantially like the former.[6] But in criminal as in civil actions, it is essential that the judgment be on the merits, and not tainted with fraud.[7] Thus going into a favorable court, and submitting to a conviction, in order to escape a severe penalty, is no bar to a *bona fide* prosecution.[8]

[1] McKnight *v.* Dunlop, 4 Barb. 36.
[2] Angel *v.* Hollister, 38 N. Y. 378.
[3] Rice *v.* King, 7 Johns. 20.
[4] Harris *v.* Miner, 28 Ill. 139.
[5] Johnson *v.* Smith, 8 Johns. 383.
[6] Lesslie *v.* State, 18 Ohio St. 390.
[7] State *v.* Swepson, 79 N. C. 632.
[8] Phillipps on Evidence, note 292; State *v.* Little, 1 N. H. 257; Commonwealth *v.* Jackson, 2 Va. Cas. 501; Commonwealth *v.* Alderman, 4 Mass. 477; State *v.* Cole, 48 Mo. 70; State *v.* Colvin, 11 Humph. 599; 54 Am. Dec. 58; note to State *v.* Solomons, 27 Am.

There are many cases in which though a defendant has not been in fact acquitted, yet he is entitled to the same protection as if such acquittal had taken place. Before the calling of a cause for trial, and until the jury is sworn to try it, the prosecuting attorney may ask that a judgment of *nolle prosequi* be entered;[1] and when entered, like a judgment of nonsuit in a civil action, it merely terminates the action in which it is entered, without affecting the right to prosecute another action for the same cause.[2]

If the defendant reaches that stage in the cause in which he is regarded as in jeopardy, the right to enter a judgment of *nolle prosequi* ceases. There is some difference of opinion respecting the point in a trial at which the defendant is first in jeopardy. There are a few authorities which declare him not to be in jeopardy until after the jury has returned its verdict;[3] but an almost overwhelming preponderance of authorities maintains that when a defendant is placed on trial before a competent court, and a jury is impaneled and sworn, he is in jeopardy, and there is no longer any authority to enter a judgment of *nolle prosequi*, and he must be treated as acquitted, unless the trial is permitted to proceed until, by reason of the death or illness of the judge or of a juryman, or the inability of the jury to agree, or from some other overruling necessity, the jury is discharged without a verdict.[4] Un-

Dec. 475–478; Watkins *v.* State, 68 Ind. 427; 34 Am. Rep. 273; McFarland *v.* State, 68 Wis. 400; 60 Am. Rep. 867; State *v.* Simpson, 28 Minn. 66; 41 Am. Rep. 269.

[1] McFadden *v.* Commonwealth, 23 Pa. St. 12; 62 Am. Dec. 308; Mount *v.* State, 14 Ohio, 295; 45 Am. Dec. 542; State *v.* Champeau, 52 Vt. 313; 36 Am. Rep. 754.

[2] State *v.* Hornsby, 8 Rob. (La.) 583; 41 Am. Dec. 314; Commonwealth *v.* Briggs, 7 Pick. 179.

[3] People *v.* Goodwin, 18 Johns. 187; 9 Am. Dec. 203; State *v.* Moor, Walk. (Miss.) 134; 12 Am. Dec. 541; Taylor *v.* State, 35 Tex. 97; United States *v.* Perez, 9 Wheat. 579.

[4] Lee *v.* State, 26 Ark. 260; 7 Am. Rep. 60; Hines *v.* State, 24 Ohio St. 134; 17 Am. Rep. 436; McFadden *v.* Commonwealth, 23 Pa. St. 12; 62 Am. Dec. 308; People *v.* Cage, 48 Cal. 323; 17 Am. Rep. 436; People *v.* Hunckeler, 48 Cal. 334; Teat *v.* State, 53 Miss. 453; 24 Am. Rep. 708; Brink *v.* State, 18 Tex. App. 344; 51 Am. Rep. 317; United States *v.* Shoemaker, 2 McLean, 114. For authorities showing when the defendant is so far placed in jeopardy to be entitled to be considered as acquitted, unless a verdict of guilty has been found against him, see Ex parte Clements, 50 Ala. 459; People *v.* Olcott, 2 Johns. Cas. 301; 1 Am. Dec. 168, and note; State *v.* Woodruff, 2 Day, 504; Am. Dec. 122; People *v.* Barrett, 2 Caines, 304; 2

der constitutional provisions universally prevailing, no person is permitted to be placed twice in jeopardy for the same offense.[1] Therefore, if, after a defendant has been placed in jeopardy, a *nolle prosequi* is entered, or the jury is discharged without sufficient cause before returning a verdict, the defendant is, in contemplation of law, acquitted;[2] and when he is again placed on trial the only question is, whether the offense for which he is sought to be tried is the same as that of which he has been acquitted.

In criminal prosecutions, as in civil cases, when a former judgment in favor of the defendant is pleaded in bar, the most satisfactory test, and the one most easily applied, is to inquire whether evidence competent and sufficient to sustain conviction under the second indictment would have been equally competent and sufficient to support a conviction on the indictment under which the defendant has been acquitted. If the inquiry must be answered in the affirmative, then the plea should be sustained.[3] If, on the other hand, the evidence necessary to justify a conviction under the second indictment could not have sustained one under the first, the plea should be overruled. The evidence required to convict under the second indictment might have been unavailing if offered under the

Am. Dec. 239; People *v.* Goodwin, 18 Johns. 187; 9 Am. Dec. 203; Commonwealth *v.* Cook, 6 Serg. & R. 577; 9 Am. Dec. 465, and note; State *v.* Moor, Walk. (Miss.) 134; 12 Am. Dec. 541, and note; State *v.* Burket, 2 Mill, 155; 12 Am. Dec. 662; Commonwealth *v.* Purchase, 2 Pick. 521; 13 Am. Dec. 452.

[1] State *v.* McKee, 1 Bail. 651; 21 Am. Dec. 499, and note; State *v.* Cooper, 13 N. J. L. 361; 25 Am. Dec. 490; Black *v.* State, 36 Ga. 447; 91 Am. Dec. 772; Dinkey *v.* Commonwealth, 17 Pa. St. 126; 55 Am. Dec. 542.

[2] O'Brian *v.* Commonwealth, 9 Bush, 333; 15 Am. Rep. 715; Wright *v.* State, 5 Ind. 290; 61 Am. Dec. 90; State *v.* Wilson, 50 Ind. 477; 19 Am. Rep. 719; State *v.* McGimsey, 80 N. C. 377; 30 Am. Rep. 90; Hilands *v.* Commonwealth, 111 Pa. St. 1; 56 Am. Rep. 235.

[3] State *v.* Norvell, 2 Yerg. 24; 24 Am. Dec. 458; Campbell *v.* People, 109 Ill. 565; 50 Am. Rep. 621; Black *v.* State, 36 Ga. 447; 91 Am. Dec. 772; Parchman *v.* State, 2 Tex. App. 228; 28 Am. Rep. 435; State *v.* Larkin, 49 N. H. 36; 6 Am. Rep. 456; Durham *v.* People, 4 Scam. 172; 39 Am. Dec. 407; Dinkey *v.* Commonwealth, 17 Pa. St. 126; 55 Am. Dec. 542; Dominick *v.* State, 40 Ala. 680; 91 Am. Dec. 496. The true test is, "Could the prisoner, upon any evidence that might have been produced, have been convicted upon the first indictment of the offense that is charged in the second?": Commonwealth *v.* Bakeman, 105 Mass. 53; State *v.* Horneman, 16 Kan. 452; Price *v.* State, 19 Ohio, 423.

former indictment, because of the entire insufficiency of that indictment to support a conviction of any crime whatever. If so, his former trial could not have placed the defendant in jeopardy, because he was not accused of any criminal offense, and not being accused of any offense, he has not been acquitted of any, and his plea of former acquittal cannot prevail.[1] Though no *nolle prosequi* can be entered without consent of the defendant after the submission of any evidence to the jury, where the trial is regularly brought on, yet if the arraignment of the defendant is omitted, and he is tried without any plea, he is not put in jeopardy, because there is no issue to which the evidence can be applied, and a *nolle prosequi* may therefore be entered without his consent.[2]

Though the indictment under which an acquittal has been had charges an offense apparently different from that charged in the second indictment, still the plea of former acquittal may be sustained by showing that the defendant could not have been guilty of the crime with which he is now charged without also being guilty of that of which he has been acquitted, as where the crimes charged in both indictments are parts of the same criminal act. Hence if two murders are committed by the same act,[3] or several pieces of property are embraced in the same theft,[4] or destroyed by the same arson,[5] an acquittal of the murder of one of these persons, or of the larceny or arson of one of these parcels of property, is an acquittal as to the other.

Whoever, being convicted on a valid indictment, avails himself of any remedy to relieve himself of the conviction, on the ground that it is irregular or erroneous, does so on the implied condition of submitting himself to a new

[1] Pritchett *v.* State, 2 Sneed, 285; 62 Am. Dec. 468; State *v.* Ray, Rice, 1; 33 Am. Dec. 90; Black *v.* State, 36 Ga. 447; 91 Am. Dec. 772.

[2] Bryans *v.* State, 34 Ga. 323.

[3] People *v.* Majors, 65 Cal. 138; 52 Am. Rep. 295; Teat *v.* State, 53 Miss. 439; 24 Am. Rep. 708; State *v.* Nash, 86 N. C. 650; 41 Am. Rep. 742; Clem *v.* State, 42 Ind. 420; 13 Am. Rep. 369.

[4] Fisher *v.* Commonwealth, 1 Bush, 211; 89 Am. Dec. 620.

[5] State *v.* Colgate, 31 Kan. 511; 47 Am. Rep. 507.

trial, whether he applies for it in the court below or not.[1] Whenever a charge includes a minor charge, an acquittal of the former includes the latter. Thus a verdict of not guilty on an indictment for murder bars a prosecution for manslaughter.[2] This rule can apply only when, under the indictment for the greater crime, it was legally possible, under evidence properly admissible at the former trial, to have convicted the defendant of the lesser crime, in bar of prosecution for which he pleads his former acquittal. Therefore, in those states in which, under an indictment of one as principal, it is not possible to convict him of being an accessary, his acquittal does not bar his subsequent prosecution and conviction under an indictment charging him with being an accessary before the fact of the commission of the same crime.[3]

§ 319. **Judgments in Criminal Cases as Evidence in Civil.** — The record of a conviction or of an acquittal is not, according to a decided preponderance of authority, conclusive of the facts on which it is based in any civil action.[4] Thus an action of trover for money alleged to be stolen is not prejudiced by the acquittal of the defendant on a prosecution for theft in taking the same goods.[5] A was indicted and convicted of obstructing a highway. After the removal of the obstruction, he commenced an action against B for using the same highway. In this action the question arose whether the conviction could be pleaded against A as an estoppel. The court held that it could not, but that it might, however, be placed in evidence for the purpose of showing that the *locus in quo* was a highway.[6] The chief reason for excluding the record of

[1] Stewart *v.* State, 13 Ark. 736.

[2] Phillipps on Evidence, 56; Sanders *v.* State, 55 Ala. 42.

[3] State *v.* Larkin, 49 N. H. 36; 6 Am. Rep. 456; Rex *v.* Plant, 7 Car. & P. 575; State *v.* Buzzell, 58 N. H. 257; 42 Am. Rep. 586.

[4] Betts *v.* New Hartford, 25 Conn. 185; 1 Greenl. Ev., sec. 537; Corbley *v.* Wilson, 71 Ill. 209; 22 Am. Rep. 98; Steel *v.* Cazeaux, 8 Mart. (La.), 318; 13 Am. Dec. 288, and note; Mead *v.* Boston, 3 Cush. 404; Cluff *v.* Mutual B. L. I. Co., 99 Mass. 317; Cottingham *v.* Weeks, 54 Ga. 275.

[5] Hutchinson *v.* Bank of Wheeling, 41 Pa. St. 42; 80 Am. Dec. 596; Beausoliel *v.* Brown, 15 La. Ann. 543.

[6] Petrie *v.* Nuttall, 11 Ex. 569.

a criminal prosecution from evidence in a civil case is that the parties to the two proceedings are different. One who has been damaged by some criminal act of another has a claim for remuneration, independent of the right of the public to proceed against the offender, and to inflict the penalty prescribed by law. This right to compensation in damages ought not to be, and is not, dependent on the success or failure of the prosecution conducted by the people. If it were, the party most injured would be prejudiced by a proceeding to which he was not a party, and which he had no power to control. A person convicted of any offense is not estopped by the conviction from disputing the facts on which it is based in a civil action, because his adversary in the civil action would not have been barred if the prosecution had terminated in an acquittal.

Notwithstanding the weight of reason and of precedent opposing the admission of any record of a criminal cause as an estoppel in any civil action, it must be admitted that the precedents are not, on this subject, consistent with one another. In one case it was declared not to be an error to instruct a jury on a trial in a civil action for an assault and battery that the conviction of the defendant on an indictment for the same offense showed that the plaintiff was entitled to damages;[1] in another, the record of the conviction of the defendant upon an indictment for adultery was received, in a subsequent action against him for divorce, as evidence both of the adultery and of his marriage to plaintiff;[2] and the record of plaintiff's conviction is doubtless conclusive evidence against him, in an action for malicious prosecution resulting in such conviction, that such prosecution was not without probable cause.[3] This effect of such conviction continues

[1] Moses *v.* Bradley, 3 Whart. 272. See Horwood *v.* Smith, 2 Term Rep. 750; Maybee *v.* Avery, 18 Johns. 352.

[2] Anderson *v.* Anderson, 4 Greenl. 100; 16 Am. Dec. 237; Randall *v.* Randall, 4 Greenl. 326.

[3] Herman on Estoppel, sec. 155; Griffis *v.* Sellars, 3 Dev. & B. 492; 31 Am. Dec. 422; Herman *v.* Bookerhoff, 8 Watts, 240.

in some of the states, though a new trial has been granted or the judgment reversed upon appeal;[1] in others, such conviction, after being set aside upon appeal, or by the granting of a new trial, is *prima facie* evidence only of the existence of probable cause;[2] while in others it remains conclusive evidence, unless shown to have been procured by artifice or fraud.[3]

Of course, judgments in criminal, like those in civil, cases are always competent evidence of their own rendition. Thus in an action for malicious prosecution, the record in the criminal case may be put in evidence to establish the facts that there was a prosecution resulting in an acquittal. In prosecutions against accessaries or against receivers of stolen goods, the conviction of the principal is admissible for the purpose of establishing that a conviction of the principal has been had, but not to show that a crime was committed, or that the principal is in fact guilty.[4] So a judgment of conviction founded upon a plea of guilty may be received in a civil action as an admission by the defendant of the facts confessed by his plea;[5] but this is manifestly only a mode of proving such admission, and cannot be regarded as estopping the defendant from showing that notwithstanding such confession and conviction he was not guilty.[6] So it has been held, under a prosecution for trespass in unlawfully removing stakes and rails from a boundary line, a judgment in a civil action rendered before the commission of the alleged trespass, in an action to which defendant was a party, was conclusive evidence against him of the location of such line.[7]

[1] Whitney *v.* Peckham, 15 Mass. 243; Parker *v.* Huntington, 7 Gray, 36; 66 Am. Dec. 455; Parker *v.* Farley, 10 Cush. 279; Cloon *v.* Gerry, 13 Gray, 203; Dennehey *v.* Woodsum, 100 Mass. 197; Griffis *v.* Sellars, 3 Dev. & B. 492; 31 Am. Dec. 422.

[2] Goodrich *v.* Warner, 21 Conn. 432; Burt *v.* Place, 4 Wend. 591.

[3] Spring *v.* Besone, 12 B. Mon. 555; Kaye *v.* Kean, 18 B. Mon. 839; Womack *v.* Circle, 29 Gratt. 192.

[4] Phillipps on Evidence, note 273; Greenl. Ev., sec. 537.

[5] Bradley *v.* Bradley, 11 Me. 367; Green *v.* Bedell, 48 N. H. 546.

[6] Commonwealth *v.* Horton, 9 Pick. 206; Clark *v.* Irwin, 9 Ohio, 131.

[7] Dorrell *v.* State, 83 Ind. 357.

Even where the parties are the same, there seems to be an injustice in admitting an acquittal in a criminal prosecution in evidence in a civil action, because to procure a conviction in a criminal prosecution the jury must be convinced, beyond a reasonable doubt, while in a civil action it is their duty to find according to the preponderance of evidence. Nevertheless, the authorities indicate that when a prosecution is conducted by and in the name of the United States, and results in an acquittal, the judgment is conclusive in favor of the defendant in a subsequent trial of a suit *in rem*, brought by the United States against the same defendant, in which the issues are the same as those involved in the criminal prosecution.[1]

The conviction of a defendant may be offered in evidence in a subsequent criminal prosecution against him. If so, the parties to the two prosecutions and the rules of evidence applicable to them being the same, it would appear that the former conviction is conclusive evidence of any and every fact necessarily affirmed by it, and must be received as such in the second prosecution.[2]

§ 319 a. **Judgments in Civil Cases as Evidence in Penal and Criminal Actions.** — A judgment in a civil case must generally be excluded from evidence in a criminal prosecution, because the parties are not the same, and were they the same, it would be improper to receive a judgment in a civil case as evidence of the commission of a crime of which the defendant is accused, for the reason that such judgment may be founded on a mere preponderance of evidence not sufficient to satisfy the jury beyond a reasonable doubt.[3] And where a suit is brought to recover a forfeiture, and the rule of evidence in criminal cases applies, that all the facts material to sustain such suit must be proved beyond reasonable doubt, a judgment in a civil action between the same parties is not admissible in favor

[1] Coffey *v.* U. S., 116 U. S. 436.
[2] Com. *v.* Evans, 101 Mass. 25; Com. *v.* Feldman, 131 Mass. 588.
[3] Greenl. Ev., sec. 537; Britton *v.* State, 77 Ala. 202.

of the plaintiff to establish any fact necessary to the maintenance of a civil action.[1]

§ 319 b. **The Decrees and Orders of a Probate, Orphans', or Surrogate's Court,** made in the exercise of jurisdiction conferred upon it by law, are as final and conclusive as the judgment decrees or orders of any other court. The character and finality of *res judicata* attach to their decisions, irrespective of the nature of the issue determined, provided always that the court had jurisdiction to determine it.[2] Hence, whether the adjudication be for or against the validity of a will, for or against granting letters of administration, allowing or disallowing an account, granting or refusing to grant a homestead, it is in either case a final settlement of the matter of which it assumes to dispose, and it cannot be collaterally attacked, impeached, or avoided in the same nor in any other court by any of the parties thereto, nor by any person in privity with them.[3] Courts having the management and disposition of the estates of decedents, minors, and incompetent persons exercise a jurisdiction not second in importance to that possessed by any other class of courts. Their judgments and other

[1] Riker *v.* Hooper, 35 Vt. 457; 82 Am. Dec. 646.

[2] Roach *v.* Martin's Lessee, 1 Harr. (Del.) 548; 27 Am. Dec. 746; Wyman *v.* Campbell, 6 Port. 219; 31 Am. Dec. 677; Bailey *v.* Delworth, 10 Smedes & M. 404; 48 Am. Dec. 760; McDade *v.* McDade, 7 Ga. 559; 50 Am. Dec. 407; Merrill *v.* Harris, 26 N. H. 142; 57 Am. Dec. 359; Johns *v.* Hodges, 62 Md. 525.

[3] Harris *v.* Colquit, 44 Ga. 663; Rose *v.* Lewis, 3 Lans. 320; Stiles *v.* Burch, 5 Paige, 135; Womack *v.* Womack, 23 La. Ann. 351; Rudy *v.* Ulrich, 69 Pa. St. 177; 8 Am. Rep. 238; Penderleath *v.* McGillivray, Stu. 470; Shropshire *v.* Probate Judge, 4 How. (Miss.) 142; Cole *v.* Leak, 31 Miss. 131; Crippen *v.* Dexter, 13 Gray, 330; Abbott *v.* Bradstreet, 3 Allen, 587; Simpson *v.* Norton, 45 Me. 281; Davie *v.* McDaniel, 47 Ga. 195; Caujolle *v.* Ferrie, 5 Blatchf. 225; 13 Wall. 465; Castro *v.* Richardson, 18 Cal. 478; State *v.* McGlynn, 20 Cal. 233; 81 Am. Dec. 118; Judson *v.* Lake, 3 Day, 326; Gates *v.* Treat, 17 Conn. 392; Harrison *v.* Morehouse, 2 Kerr, 584; Lewis *v.* Allred, 57 Ala. 628; Hutton *v.* Williams, 60 Ala. 107; Cummings *v.* Cummings, 123 Mass. 270; Johnson *v.* Beazley, 65 Mo. 250; 27 Am. Rep. 276; Sheetz *v.* Kirtley, 62 Mo. 417; Jones *v.* Chase, 55 N. H. 234; Roderigas *v.* East River Savings Inst., 63 N. Y. 460; 20 Am. Rep. 555; Connolly *v.* Connolly, 9 Rep. 830; Hood's Estate, 90 N. Y. 512; Hutton *v.* Laws, 55 Iowa, 710; Hodge *v.* Fabian, 31 S. C. 212; 17 Am. St. Rep. 25; Withers *v.* Patterson, 27 Tex. 491; 86 Am. Dec. 643; Turner *v.* Malone, 24 S. C. 398; Cecil *v.* Cecil, 19 Md. 72; 81 Am. Dec. 626; Wall *v.* Wall, 123 Pa. St. 545; 10 Am. St. Rep. 549.

decisions necessarily determining issues of fact submitted to them are equally conclusive with those of other courts. This principle has been applied in a variety of circumstances and proceedings. Perhaps the only well-settled exception to it is regarding the issue expressly or impliedly presented in every case in which letters testamentary or of administration are asked for; namely, the issue respecting the death of the person upon whose supposed estate administration is sought. The granting of such letters is an adjudication of such death. Nevertheless, the issuing of the letters and the order or decree granting them are no more than *prima facie* evidence of such death, and cannot estop the supposed decedent or his successors in interest from showing that he was in fact alive.[1]

Where the rules of the common law upon this subject still prevail, a will, so far as it affects real property, is left to be proved or disproved the same as an ordinary conveyance thereof, and the fact that it has been granted or refused admission to probate is entirely immaterial.[2] In some portions of the United States a will may be admitted to probate in common form, that is, without any proceeding bringing all the parties interested before the court; and where this is the case, it is not conclusive on the parties not represented. If a proceeding for the probate of a will contemplates that all the parties interested shall have notice, actual or constructive, of the application for its probate, and an opportunity to resist such probate, the decision of the court is conclusive as to every species of

[1] Tisdale *v.* Ins. Co., 26 Iowa, 170; 96 Am. Dec. 136; Lancaster *v.* Washington L. I. Co., 62 Mo. 121; Cunningham *v.* Smith, 70 Pa. St. 450; *ante*, sec. 120; Epping *v.* Robinson, 21 Fla. 36; Melia *v.* Simmons, 45 Wis. 334; 30 Am. Rep. 746; Jochumsen *v.* Suffolk Savings Bank, 3 Allen, 87; McPherson *v.* Cunliff, 11 Serg. & R. 422; 14 Am. Dec. 642; Wales *v.* Willard, 2 Mass. 120; Griffith *v.* Frazier, 8 Cranch, 9; Allen *v.* Dundas, 3 Term Rep. 125; Duncan *v.* Steuart, 25 Ala. 408; 60 Am. Dec. 527; Peeble's Appeal, 15 Serg. & R. 42; Morgan *v.* Dodge, 44 N. H. 259; 82 Am. Dec. 213; Bolton *v.* Jacks, 6 Rob. (N. Y.) 166. *Contra*, Roderigas *v.* East River Sav. Inst., 63 N. Y. 460; 20 Am. Rep. 555.

[2] Doe *v.* Calvert, 2 Camp. 389; Tompkins *v.* Tompkins, 1 Story, 547; Rowland *v.* Evans, 6 Pa. St. 435; Asay *v.* Hoover, 5 Pa. St. 21; 45 Am. Dec. 713; Smith *v.* Bonzall, 5 Rawle, 80; Holliday *v.* Ward, 19 Pa. St. 490.

property, unless the statute, in express terms, gives the parties, or some of them, further opportunity to make a contest.[1] Furthermore, the admission of a will to probate is, as to the parties bound thereby, conclusive evidence of the facts necessary to uphold it, such as the testamentary capacity of the testator,[2] or his due execution of the will,[3] and of the jurisdictional facts authorizing the court to hear and determine the application.[4] So a refusal to admit a will to probate is conclusive of the facts necessary to support it;[5] and if it was upon the merits, may further conclude the parties upon the question that the testator's residence was such that the court had jurisdiction to hear and determine the application for probate.[6] The granting of letters of administration is also a judicial decision, and, as such, conclusive upon all the issues necessarily determined by it.[7]

Executors, administrators, and guardians are, in many of the states, required to make reports of their acts and of the condition of the estates in their care, accompanied with accounts of their receipts and disbursements, either yearly or at other stated intervals, and the courts to which such accounts are made are required to allow or disallow them. The action of the court is generally *ex parte*, and for that reason is, in most of the states, not deemed a conclusive adjudication estopping the parties in subsequent

[1] Redmond *v.* Collins, 4 Dev. 430; 27 Am. Dec. 208; Wall *v.* Wall, 30 Miss. 91; 64 Am. Dec. 147; Anderson *v.* Green, 46 Ga. 361; Brigham *v.* Fayerweather, 140 Mass. 411; Warfield *v.* Fox, 53 Pa. St. 382; O'Dell *v.* Rogers, 44 Wis. 136, 173; Newman *v.* Waterman, 63 Wis. 612; 53 Am. Rep. 310; Wilson *v.* Gaston, 92 Pa. St. 207; Scott *v.* Calvitt, 3 How. (Miss.) 148; Brock *v.* Frank, 51 Ala. 85; Norvell *v.* Lessneur, 33 Gratt. 222; Dublin *v.* Chadbourn, 16 Mass. 433.

[2] Parker *v.* Parker, 11 Cush. 519; Vt. Baptist Convention *v.* Ladd, 59 Vt. 5.

[3] Moore *v.* Tanner, 5 T. B. Mon. 42; 17 Am. Dec. 35; Roach *v.* Martin, 1 Harr. (Del.) 548; 27 Am. Dec. 746.

[4] In re Griffith's Estate, 84 Cal. 107; Thornton *v.* Baker, 15 R. I. 553; 2 Am. St. Rep. 925.

[5] Schultz *v.* Schultz, 10 Gratt. 358; 60 Am. Dec. 335; Laughton *v.* Atkins, 1 Pick. 535.

[6] Thornton *v.* Baker, 15 R. I. 553; 2 Am. St. Rep. 925.

[7] Barclift *v.* Treece, 77 Ala. 528; Davis *v.* Greeve, 32 La. Ann. 420; Sims *v.* Walters, 35 La. Ann. 442; Poullain *v.* Poullain, 72 Ga. 412; McFarland *v.* Stone, 67 Vt. 165; 14 Am. Dec. 325; Lawrence *v.* Englesby, 24 Vt. 42; Naylor *v.* Moffatt, 29 Mo. 126; Savage *v.* Benham, 17 Ala. 119; Palmer *v.* Oakley, 2 Doug. (Mich.) 433; 47 Am. Dec. 41.

stages of the proceedings from showing that the account as settled was not correct.[1] If, however, the annual or partial account is excepted to by some person interested therein, and the exception is heard and determined by the court, its decision is as conclusive as between the parties contesting and the executor or administrator as if the account were final.[2] In a few of the states, a partial account and its allowance, whether excepted to or not, are conclusive in subsequent proceedings as to all the items set forth therein.[3] Orders or decrees settling final accounts entered after giving notice in the manner required by statute are conclusive evidence that the amounts found to be due thereby correctly represent the indebtedness of the party whose account is settled to the estate in his care.[4]

When a court grants an order of sale, and in pursuance of such order the property thereby authorized to be sold is sold, the purchaser, to maintain his title, is not required to re-establish the facts which the court must have found to be true before it entered such order, nor yet to defend the legal conclusions which the court drew from such facts. If any errors were committed, as in the admission or rejection of evidence, or in making findings of fact, express or implied, not sustained by the evidence, or in reaching conclusions not warranted by the facts found,

[1] Walls *v.* Walker, 37 Cal. 424; 99 Am. Dec. 290; Mix's Appeal, 35 Conn. 121; 95 Am. Dec. 222; Picot *v.* Biddle's Ex'r, 35 Mo. 29; 86 Am. Dec. 134; Liddel *v.* McVickar, 6 N. J. L. 44; 19 Am. Dec. 369; Folger *v.* Heidel, 60 Mo. 288; West *v.* West, 75 Mo. 204; Lucich *v.* Medin, 3 Nev. 93; 93 Am. Dec. 376; Clark *v.* Cross, 20 Iowa, 50; State *v.* Wilson, 51 Ind. 96; Sturtevant *v.* Tallman, 27 Me. 85; Bantz *v.* Bantz, 52 Md. 686; Watts *v.* Watts, 38 Ohio St. 480.

[2] Stayner's Case, 33 Ohio St. 481; Watts *v.* Watts, 38 Ohio St. 480; Coburn *v.* Loomis, 49 Me. 406; Clement's Appeal, 49 Conn. 535.

[3] Rhoads's Appeal, 39 Pa. St. 186; McLellan's Appeal, 76 Pa. St. 231; Foss's Appeal, 105 Pa. St. 258.

[4] App *v.* Dreisbach, 2 Rawle, 287; 21 Am. Dec. 447; Stubblefield *v.* McRaven, 5 Smedes & M. 130; 43 Am. Dec. 502; McWilliams *v.* Kalbach, 55 Iowa, 110; Williams *v.* Robinson, 63 Tex. 576; Brodrib *v.* Brodrib, 56 Cal. 563; Garton *v.* Botts, 73 Mo. 274; Shackelford *v.* Cunningham, 41 Ala. 203; Commonwealth *v.* Gracey, 96 Pa. St. 70; Ringgold *v.* Stone, 20 Ark. 526; Holden *v.* Lathrop, 65 Mich. 652; Hatcher *v.* Dillard, 70 Ala. 343; Simmons *v.* Goodell, 63 N. H. 456; Sever *v.* Russell, 4 Cush. 513; 50 Am. Dec. 811; Dunsford *v.* Brown, 23 S. C. 328.

the remedy of any party prejudiced thereby is by motion for a new trial, or by some other revisory or appellate proceeding. Failing to resort to this remedy, the order of sale must be respected, and cannot be destroyed by any collateral assault.[1] Hence the sale cannot be nullified by proof that there was no necessity therefor, nor by any other proof which involves a re-examination of the issues necessarily involved in the order of sale.[2] There are some cases which appear to permit a re-examination of the legal conclusions drawn by the court in ordering the sale. Thus sales were held void in one instance because ordered to raise funds to pay debts barred by the statute of limitations,[3] and in another because the order did not show any necessity for the sale.[4] If these and kindred cases can be maintained upon principle, it must be on the ground that the petitions and orders were so deficient in essential elements that they did not disclose any case calling for judicial action, and therefore left the court without jurisdiction.

If an order of sale has been executed by the sale of the property, the statutes generally require that the proceedings be reported to the court, whose duty it is to hear the report and the evidence offered, and either to confirm or vacate the sale. If it confirms the sale, its order is an adjudication that the prior proceedings were regular and valid, and that the sale ought to be confirmed, and, as such, is conclusive on all the parties before the court.[5]

[1] Myers *v.* Davis, 47 Iowa, 325; Fleming *v.* Bale, 23 Kan. 88; McDade *v.* Burch, 7 Ga. 559; 50 Am. Dec. 407; Long *v.* Weller, 29 Gratt. 347; Grayson *v.* Weddle, 63 Mo. 523; Pratt *v.* Houghtaling, 45 Mich. 457; Weyer *v.* Second Nat. Bank, 57 Ind. 198; Gardner *v.* Mawney, 95 Ill. 552; Merrill *v.* Harris, 26 N. H. 143; 57 Am. Dec. 359.

[2] Bowen *v.* Bond, 80 Ill. 351; Allen *v.* Shepard, 87 Ill. 314; Myers *v.* Davis, 47 Iowa, 325; Arrowsmith *v.* Harmoning, 42 Ohio St. 254; Davis *v.* Gaines, 104 U. S. 386; Abbott *v.* Curran, 98 N. Y. 665; Cromwell *v.* Hull, 97 N. Y. 209; Trumble *v.* Williams, 18 N. C. 144; Saltonstall *v.* Riley, 28 Ala. 164; 65 Am. Dec. 334; Ford *v.* Ford's Adm'r, 68 Ala. 141; Thomson *v.* Blanchard, 2 Lea, 528.

[3] Heath *v.* Wells, 5 Pick. 139; 16 Am. Dec. 383.

[4] Wyatts *v.* Rambo, 29 Ala. 510; 68 Am. Dec. 89.

[5] Montgomery *v.* Somory, 99 U. S. 482; Willis *v.* Nicholson, 24 La. Ann. 545; Cockey *v.* Cole, 28 Md. 276; 92 Am. Dec. 604; Hotchkiss *v.* Cutting, 14 Minn. 537; Wilkerson *v.* Allen, 67 Mo. 502; Freeman on Void Judicial Sales, sec. 44.

Though the statute declares that "all sales must be, under oath, reported to and confirmed by the court before the title to the property sold passes," if the order of confirmation states "that the sale was duly verified by affidavit," the validity of the sale is established, and cannot be disproved by producing the original return and showing that no verification accompanied it.[1] If, after the sale is confirmed, the purchaser fails to pay the amount of his bid, and thereupon is served with notice of a motion for a resale at his risk, and no resistance being made to the motion, such resale is ordered, and an action is thereafter brought against the purchaser for the difference between the price realized by the resale and that bid by him, he cannot defend the action by showing that the administrator made false statements at the first sale; that the decedent did not own the property sold; and that the administrator had released him from all liability to pay the purchase price and told him when he gave him notice of the resale that he would not seek to hold him liable. All these defenses are precluded by the order of resale made upon due notice.[2]

An order making a final distribution of an estate to the persons whom it finds entitled thereto as heirs, devisees, or legatees of the decedent is also a conclusive adjudication, if upon sufficient notice, that the persons to whom distribution is so made are the only persons entitled to the property distributed as such heirs, devisees, or legatees,[3] but does not estop third persons from asserting assignments or conveyances of the property made to them by the distributees before the entry of the decree of distribution.[4]

The validity of orders and decrees made by courts exercising jurisdiction over the estates of decedents, minors, and incompetent persons is, however, as in all other cases,

[1] Dennis *v.* Winter, 63 Cal. 16.
[2] Brummagim *v.* Ambrose, 48 Cal. 366.
[3] Loring *v.* Steineman, 1 Met. 204; Exton *v.* Zule, 14 N. J. Eq. 501; Judge of Probate *v.* Robins, 5 N. H. 246; Kellogg *v.* Johnson, 38 Conn. 269.
[4] Chever *v.* Ching Hong Poy, 82 Cal. 68.

dependent on their having jurisdiction over the persons and subject-matters affected thereby, and whenever the statute requires a particular notice to be given, and the omission to give it is conceded, the order or decree based thereon must be treated as void.[1] In truth, matters are regarded as jurisdictional in the probate, surrogate, and orphans' courts which are not so regarded in other courts. Thus a court ordering a sale of property is, according to the majority of the authorities, without jurisdiction to do so if the petition therefor was not presented by a person having authority to present it,[2] or was not sufficient in substance to support the order sought,[3] or did not substantially contain a statement of all the matters required by statute to be stated therein.[4]

§ 320. **Awards of Arbitrators.**—The effect of a valid award upon the matters submitted to the arbitrators is equivalent, so far as the question of estoppel is concerned, to the effect of valid judgment.[5] "No satisfactory reason can be assigned why a judgment as an act by the law

[1] Ruth *v.* Oberbrunner, 40 Wis. 238; Crosley *v.* Calhoon, 45 Iowa, 557; Michel *v.* Hicks, 19 Kan. 578; 27 Am. Rep. 161.

[2] Miller *v.* Miller, 10 Tex. 319; Washington *v.* McCaughan, 34 Miss. 304; Pryor *v.* Downey, 50 Cal. 389; 19 Am. Rep. 656; Long *v.* Burnett, 13 Iowa, 28; 81 Am. Dec. 410; Withers *v.* Patterson, 27 Tex. 501; 86 Am. Dec. 643.

[3] Bompart *v.* Lucas, 21 Mo. 598; Farrar *v.* Dean, 24 Mo. 16; Wyatt's Adm'r *v.* Rambo, 29 Ala. 510; 68 Am. Dec. 89; Newcomb *v.* Smith, 5 Ohio, 448; Withers *v.* Patterson, 27 Tex. 499; 86 Am. Dec. 643; Ikelheimer *v.* Chapman, 32 Ala. 676; Hall *v.* Chapman, 35 Ala. 553; Pryor *v.* Downey, 50 Cal. 389; 19 Am. Rep. 656; Wilson *v.* Armstrong, 42 Ala. 168; 94 Am. Dec. 635; Spencer *v.* Jennings, 114 Pa. St. 613; Stuart *v.* Allen, 16 Cal. 473; 76 Am. Dec. 551; Bloom *v.* Burdick, 1 Hill, 130; 37 Am. Dec. 299; Morris *v.* Hogle, 37 Ill. 150; 87 Am. Dec. 243.

[4] Guy *v.* Pierson, 21 Ind. 18; Verry *v.* McClellan, 6 Gray, 535; 66 Am. Dec. 423; Tenny *v.* Poore, 14 Gray, 502; 77 Am. Dec. 340; Wilson *v.* Hastings, 66 Cal. 243; Boland's Estate, 55 Cal. 310; Rose's Estate, 63 Cal. 346; Wright *v.* Edwards, 10 Or. 298; Hayes *v.* McNealy, 16 Fla. 409; Ryder *v.* Flanders, 39 Mich. 336; Young *v.* Young, 12 Lea, 335; Arnett *v.* Bailey, 60 Ala. 435; Gregory *v.* McPherson, 13 Cal. 562; Gregory *v.* Taber, 19 Cal. 397; 79 Cal. 219; Bree *v.* Bree, 51 Ill. 367; Freeman on Void Judicial Sales, secs. 11, 12.

[5] 2 Smith's Lead. Cas. 671; Jarvis *v.* Fountain W. Co., 5 Cal. 179; Johnston *v.* Paul, 23 Minn. 46; Kane *v.* Fond du Lac, 40 Wis. 495; Whitlock *v.* Crew, 28 Ga. 289; Hostetter *v.* Pittsburgh, 107 Pa. St. 419; Curley *v.* Dean, 4 Conn. 259; 10 Am. Dec. 140; Johnson *v.* Noble, 13 N. H. 286; 38 Am. Dec. 485; Shackleford *v.* Purket, 2 A. K. Marsh. 485; 12 Am. Dec. 432; Chapline *v.* Overseers, 7 Leigh, 231; 30 Am. Dec. 504.

should estop the parties, and an award, which is another name for a judgment, which the parties have expressly stipulated should be final as to the subjects submitted, should not be equally conclusive."[1]

The authorities disagree in relation to the effect of an award, upon a submission of *all demands*, on a matter which *in fact* was never presented to the arbitrators. In New York, the position is taken that "it would be a very dangerous precedent to allow a party, on a submission so general, intended to settle everything between the parties, to lie by and submit only part of his demands, and then institute a suit for the part not brought before the arbitrators. The object of the submission was to avoid litigation; and neither party is at liberty to withhold a demand from the cognizance of the arbitrators on such submission, and then to sue for it."[2] Just and reasonable as this view seems, it has not met with general approbation. On the contrary, it appears to be well settled by a decided preponderance of authorities that, notwithstanding the general language of the submission, the award will conclusively determine nothing not in fact submitted, and that the *prima facie* final effect of the award may be overthrown by any evidence which sufficiently proves that a specified matter was never presented to the arbitrators.[3] But, in Massachusetts, if a general submission of all demands is made, it is in the power of either of the parties to insist upon the presentation of any claim held by his adversary; and if any party, upon being requested to place any matter before the arbitrators, declines to do so, he is precluded from ever afterward assert-

[1] Brazill *v.* Isham, 12 N. Y. 9.

[2] Wheeler *v.* Van Houten, 12 Johns. 311; Owen *v.* Boerum, 23 Barb. 187. Cases sustaining the New York cases are Smith *v.* Johnson, 15 East, 213; Bunnell *v.* Pinto, 2 Conn. 431; McGimsey *v.* Traverse, 1 Stew. 244; 18 Am. Dec. 43. An award is conclusive as to the matters submitted; but if it is doubtful from the terms of the submission whether a matter was submitted and passed upon, then evidence should be admitted as to the fact of the case: Keaton *v.* Mulligan, 43 Ga. 308.

[3] King *v.* Savory, 8 Cush. 309; Edwards *v.* Stevens, 1 Allen, 315; Bixby *v.* Whitney, 5 Greenl. 192; Newman *v.* Wood, Mart. & Y. 190; Buck *v.* Buck, 2 Vt. 420; Whittemore *v.* Whittemore, 2 N. H. 26; Engleman *v.* Engleman, 1 Dana, 437.

ing it.[1] By following the course pointed out by this decision, most of the evils arising from permitting a party to avoid the effect of an award by showing that a matter was overlooked and not presented may be avoided. For either party may, if he wish, escape from the vexation of subsequent litigation, so far as regards any pretension of his adversary of which he has any knowledge. Still, it would seem more logical, and more consistent with the principles applied to other legal controversies, to require each party to remember his own demands, instead of requiring his adversary both to ascertain and suggest the existence of such demands, or to be subjected to the inconvenience of another litigation.

§ 321. **Real Estate — General Submission.** — A general submission of all actions and causes of action, and of all quarrels, controversies, trespasses, damages, and demands whatsoever, authorizes the arbitrators to take cognizance of questions concerning real property. The law does not require a more specific submission as to one kind of property than as to another.[2] Doubts were formerly entertained whether "the title to land was submissible, since it is in realty"; but these doubts were settled by declaring the law to be that awards respecting realty "stand upon the same ground as those respecting personal property."[3] While an award cannot operate as a conveyance, it may operate as an estoppel, and conclude the parties in a subsequent controversy respecting real property from contesting the questions settled by it.[4]

§ 322. **Matters not in Dispute.** — It is generally conceded that the mere existence of a cause of action will not bring it within a general submission if it is not a matter

[1] Warfield *v.* Holbrook, 20 Pick. 531.

[2] Sellick *v.* Addams, 15 Johns. 197; Munro *v.* Alaire, 2 Caines, 327; 2 Am. Dec. 330; Marks *v.* Marriott, 1 Ld. Raym. 114; Byers *v.* Van Deusen, 5 Wend. 268.

[3] Shelton *v.* Alcox, 11 Conn. 240.

[4] Shelton *v.* Alcox, 11 Conn. 240; Robertson *v.* McNiel, 12 Wend. 575; Carey *v.* Wilcox, 6 N. H. 177; Porter's Lessee *v.* Matthews, 2 Harr. (Del.) 30; Davis *v.* Havard, 15 Serg. & R. 165; 16 Am. Dec. 537; Cox *v.* Jagger, 2 Cow. 638; 14 Am. Dec. 532.

of dispute between the parties when the agreement to submit to arbitration is consummated.[1] But the submission of a controversy growing out of a specified contract or transaction, or of an account relating to a particular course of dealing, must be so regarded that neither party shall be allowed to rebut the conclusive effect of the award by showing that some item was not laid before the arbitrators.[2] But a judgment on an award in favor of the builder and against the owner of a house, upon a submission of all demands, is no bar to an action against the builder by the owner to recover a sum which he was subsequently, though before payment of the award, compelled to pay to discharge a mechanic's lien.[3]

§ 323. **Bill of Review.** — A complaint for the review of a judgment is in the nature of a writ of error. A second complaint to review the same judgment, after a final hearing on the former complaint, will not be permitted.[4]

§ 324. **Habeas Corpus.** — The writ of *habeas corpus* may be resorted to, — 1. By or in behalf of some person who is imprisoned or otherwise deprived of his liberty; or 2. On behalf of some person claiming the right to the custody of a minor or other person, and that he is deprived of such custody by some person not entitled to do so. In cases of the first class it is well settled that the remanding to custody of the person claimed to be illegally imprisoned is not a decision to which the principle of *res judicata* is applied. A party may apply successively to every court having jurisdiction to grant the writ for his discharge, until he exhausts the entire judicial authority of the state.[5] "How far judges would go in their examination, after a case had once been determined, is a question

[1] Ravee *v.* Farmer, 4 Term Rep. 146; Elliott *v.* Quimby, 13 N. H. 181; Robinson *v.* Morse, 29 Vt. 404; Trescott *v.* Baker, 29 Vt. 459.

[2] Briggs *v.* Brewster, 23 Vt. 100; Dunn *v.* Murray, 9 Barn. & C. 780.

[3] Hale *v.* Huse, 10 Gray, 99.

[4] Coen *v.* Funk, 26 Ind. 289; Strader *v.* Heirs of Byrd, 7 Ohio, 184.

[5] In re Snell, 31 Minn. 110.

which must rest exclusively in their own sound judgment; but a previous examination cannot prevent their right to re-examine the whole case if they should think proper to do so."[1] If, on the other hand, the prisoner is discharged from custody, this is an adjudication that at that time he was entitled to his liberty, and is conclusive in his favor, should he be again arrested, unless some authority can be shown for holding him, which did not exist at the time of his discharge.[2]

In the cases of the second class to which we have referred, though the party in whose behalf the writ issues may be restrained of his liberty, yet the real object of the parties in suing out the writ is to obtain a decision upon some claim of right made either by the party against whom the writ issues, or the party by whom the application for it was made; and he whose restraint is alleged is often brought into court merely to enable it to determine conflicting claims of others to his custody. Where such is the case, the principle of *res judicata* applies, and the determination by the court of the issues presented is conclusive upon the real contestants. The father of a minor procured the issuing of a writ of *habeas corpus*, and when he was brought into court in response to the writ, it was claimed that the officer against whom the writ had issued had the right to detain him in custody as a soldier enlisted in the service of the United States. The claim was overruled, and the prisoner discharged from custody. Being again taken into custody by the military authorities, he obtained a writ of *habeas corpus* on his own application, and insisted that his former discharge was conclusive in his favor. In sustaining this claim the court said: "The decision upon that writ, after notice and full hearing, discharging him from the custody of Captain

[1] In the Matter of Perkins, 2 Cal. 429; Matter of Edward Ring, 28 Cal. 247; Ex parte Kaine, 3 Blatchf. 1; In re Blair, 4 Wis. 522; Bell *v.* State, 4 Gill, 301; 45 Am. Dec. 130; Wade *v.* Judge, 5 Ala. 130; Ex parte Reynolds, 6 Parker, 276.

[2] Ex parte Jilz, 64 Mo. 205; 27 Am. Rep. 218; Yates *v.* People, 6 Johns. 337.

Wheaton, was an adjudication that he was not liable to be held as an enlisted soldier, and a conclusive determination of all questions of law and fact necessarily involved in that result. Any facts which the respondent deemed material upon that issue should have been proved at that hearing, and any ruling in matter of law with which he was dissatisfied should have been then reserved. The judicial discharge of a prisoner upon *habeas corpus* conclusively settles that he was not liable to be held in custody upon the then existing state of facts. Neither the effect of his having been previously registered and ordered into custody as a deserter, nor either of the other questions discussed at the bar, — whether his oath that he was of age should be deemed conclusive upon that point, or whether a minor more than eighteen years old could be lawfully enlisted without the consent of his parent or guardian, — is therefore now open for consideration. Nor is it material that the petition for the first writ was made by the prisoner's father, and that for the present writ by himself. Neither the form of the writ nor the effect of the discharge is varied by the name on which the petition is presented."[1]

The principle of *res judicata* is also applicable to proceedings on *habeas corpus*, so far at least as they involve an inquiry into and a determination of the rights of conflicting claimants to the custody of minor children. The decision on a former writ is conclusive in a subsequent application, unless some new fact has occurred which has altered the state of the case or the relative claims of the parents or other contestants to the custody of the child in some material respect. The principles of public policy requiring the application of the doctrines of estoppel to judicial proceedings, in order to secure the repose of society, are as imperatively demanded in the cases of private individuals contesting private rights under the

[1] McConologue's Case, 107 Mass. 170; citing Ex parte Milburn, 9 Pet. 704; Spalding *v.* People, 7 Hill, 301; Betty's Case, 20 L. Rep. 455.

form of proceedings in *habeas corpus* as if the litigation were conducted in any other form. Otherwise, as is well stated in the opinion of Senator Paige, "such unhappy controversies as these may endure until the entire impoverishment or the death of the parties renders their further continuance impracticable. If a final adjudication upon a *habeas corpus* is not to be deemed *res adjudicata*, the consequence will be lamentable. This favored writ will become an engine of oppression, instead of a writ of liberty."[1] "The question of the custody of a minor child, once properly and finally adjudicated, whether in a *habeas corpus* proceeding or otherwise, is settled for all time, unless there be an appeal, and the judgment rendered is impregnable as against a collateral assault."[2]

§ 325. **Motions and Orders.** — "The principle of *res adjudicata* which prevents a matter being twice litigated has no application to a mere interlocutory motion."[3] The decision of a motion is never regarded in the light of *res adjudicata*.[4] Such are the general declarations made in divers cases. If conceded to be technically correct, they are not well calculated to convey to the reader an accurate conception of the effect of the decision of a motion upon subsequent proceedings in the same case. The decision of a motion will be considered, — 1. With regard to its effect in other cases; and 2. With regard to its effect upon motions involving similar questions in the same case. As a general rule, the decision of a motion or of a summary application "will not be so far conclusive upon the parties as to prevent their drawing the same matters in question again in the more regu-

[1] Mercien *v.* People, 25 Wend. 99; 35 Am. Dec. 653; Mercien *v.* People, 3 Hill, 399; 38 Am. Dec. 644; State *v.* Bechdel, 37 Minn. 360; 5 Am. St. Rep. 854.

[2] Brooke *v.* Logan, 112 Ind. 183; 2 Am. St. Rep. 177; Dubois *v.* Johnson, 96 Ind. 6.

[3] Belmont *v.* Erie R. R. Co., 52 Barb. 637; Van Rensselaer *v.* Sheriff, 1 Cow. 501; Simson *v.* Hart, 14 Johns. 75; Akerly *v.* Vilas, 16 Int. Rev. Rec. 154; 5 Chic. L. N. 73; 3 Biss. 332.

[4] Snyder *v.* White, 6 How. Pr. 321; Easton *v.* Pickersgill, 75 N. Y. 599.

lar form of a suit either in law or equity."[1] The reasons for holding such decisions not to be conclusive in a regular suit were in an early case in New York stated to be because "it is a fact well known that such motions do not admit of that grave discussion and consideration as questions arising on demurrer, in arrest of judgment, or for a new trial. Again, decisions on summary application can never be thrown into the shape of a record, and become the subject of review in any other court."[2] A statute of Kansas provided that a court may either reject or confirm a sale made under execution. It was held that while the court might, on hearing the motion for confirmation, inquire into the fraudulent conduct of the officers conducting the sale, or of the bidders attending it, yet that the decision of the motion would not affect the ultimate rights of the parties in a regular suit involving the same issues. It will be seen that the reasoning of the court in the case of *Simson* v. *Hart*, 14 Johns. 75, which seems to be a leading American case upon the subject, is inapplicable to those motions which admit of "grave discussion and deliberation," and are capable of "being thrown into the shape of a record," and being the "subject of review in another court."

In New York the decision of a motion, notwithstanding the general declarations to the contrary frequently made, may be *res judicata*. This is proved by the case of *Dwight* v. *St. John*, 25 N. Y. 203. Upon the trial of that case, the plaintiff gave in evidence the papers, upon a motion made by the defendant in the supreme court, to have the judgments canceled and discharged of record as satisfied. Upon the motion being made, the court directed a reference to inquire and report as to the facts set up by the parties, which were substantially the same as those averred by them in the second action. Upon the coming in of

[1] Dickenson *v.* Gilliland, 1 Cow. 495; Watson *v.* Jackson, 24 Kan. 442; Sanderson *v.* Daily, 83 N. C. 67; Proctor *v.* Cole, 104 Ind. 373; Kanne *v.* Minneapolis etc. R. R. Co., 33 Minn. 419; Easton *v.* Pickersgill, 75 N. Y. 599; Ashton's Appeal, 73 Pa. St. 153.

[2] Simson *v.* Hart, 14 Johns. 75.

the referee's report, the court denied the motion to satisfy the judgments. In the second action the decision of this motion was claimed as *res judicata*. In allowing this claim the court of appeals said: "Upon this point it is to be observed that some decisions (made before the existence of the code), especially that of *Simson* v. *Hart*, in the court of errors, 14 Johns. 63, are chiefly based upon the ground that such summary proceedings as they passed upon were then heard without full proofs, and were not reviewable, whereas in the case before us the hearing was upon full proofs; and the code has entirely taken away the other ground by making the proceeding liable to review. Since, then, a full hearing, with the right of appeal, was open to the defendant on that motion, how is he to avoid the binding effect of that decision, so far as it covers what was actually and necessarily tried on that reference?" After specifying the issues which, in its judgment, were involved in the motion in the former action, and were then determined against the defendant, the court adds: "To this extent, therefore, the defendant should be held concluded by that adjudication," and "so much, then, is finally adjudicated against the defendant; and this court has now no power to interfere with that decision." From this decision we may infer that in New York, if not in other states, the decision of a motion is as final and conclusive as the decision of a trial, if the proceedings permit of a full hearing upon the merits, and the order made is liable to review in some appellate court.[1] In Georgia the denial of a motion to set aside a judgment was assumed to estop the applicant from prosecuting a subsequent motion for the same purpose.[2] The question whether an issue has or has not become *res judicata* because litigated and determined in a summary proceeding is one upon which, in view of the more recent decisions, it must be very difficult to decide. The tendency of these decisions

[1] Petition of Livingston, 34 N. Y. 555. See Easton *v.* Pickersgill, 75 N. Y. 599.

[2] Grier *v.* Jones, 54 Ga. 154.

is to disregard the form or time of an adjudication, and to inquire whether the question really arose and was or might have been contested on the merits, and was necessarily decided by the court. If so, it will generally be regarded as conclusively and finally settled, though such decision disposed of a motion, rather than of an independent action or proceeding, and especially if the action of the court was subject to review by some appropriate appellate proceeding.[1]

We now come to consider the question whether the granting or denying of a motion during the progress of a cause, or even after the rendition of a judgment, amounts to a prohibition of a subsequent motion involving the same issues which have been considered and determined on the former application. "Courts, to prevent vexatious and repeated applications on the same point, have rules which preclude the reagitation of the same question on the same state of facts. These rules are for the orderly conduct of business, and are not founded on the principle of *res judicata*. It is not uncommon, in courts of law, to deny a motion one day and on another to grant it on a more enlarged state of facts."[2] The rules here referred to seem to require that leave of the court must first be obtained before a motion can be renewed upon substantially the same grounds as those upon which the court has already passed. "It is entirely in the discretion of a court to hear a renewal of a motion or not. They can, as they deem advisable, hear it on precisely the same papers. This, of course, will be rarely allowed; it would be productive of the most serious inconvenience; but still there may be occasions which would render it essential to justice."[3] The reasons assigned for investing courts with a discretionary power in rehearing matters decided upon

[1] See citations at end of section 326.

[2] Simson *v.* Hart, 14 Johns. 63; Belmont *v.* Erie R. R. Co., 52 Barb. 637.

[3] White *v.* Munroe, 33 Barb. 650; Dollfus *v.* Frosch, 5 Hill, 493; 40 Am. Dec. 368; Smith *v.* Spalding, 3 Rob. (N. Y.) 615; Katz *v.* August, cited in Belmont *v.* Erie R. R. Co., 52 Barb. 637.

motion are applicable only to those proceedings from which no redress can be obtained by appeal. "In motions, such as these, not appealable, a grievous wrong may be committed by some misapprehension or inadvertence of the judge, for which there would be no redress if this power did not exist."[1] A motion may be renewed without leave upon new matter; but "'the new matter' which will alone justify the renewal of a motion without leave must be something which has happened, or for the first time come to the knowledge of the party moving, since the decision of the former motion."[2] "Affidavits which merely present additional or cumulative evidence on the points before presented are not to be considered as showing new grounds for a motion."[3]

§ 326. **Rules Applied to Motions.** — It will be seen from an examination of the cases, both English and American, that while the doctrine of *res adjudicata* is in general said not to be *strictly* applicable to motions, yet that the courts have in its place adopted rules, which, in the prevention of the reagitation of the same matter, operate substantially like the rules of *res judicata*, so far, at least, that the decision of a motion *heard upon the merits* is conclusive of a subsequent motion in the same case proceeding upon the same grounds.[4] The court will rarely use its discretionary powers to allow the renewal of a motion, unless "in the circumstances of the opposition there is something to excite suspicion of unfairness, or a belief that

[1] Same cases named in preceding citation.

[2] Willett *v.* Fayerweather, 1 Barb. 72.

[3] Ray *v.* Connor, 3 Edw. Ch. 478.

[4] Davies *v.* Cottle, 3 Term Rep. 405; Mitchell *v.* Allen, 12 Wend. 290; Dodd *v.* Astor, 2 Barb. Ch. 395; Bascom *v.* Feazler, 2 How. Pr. 16; Greathead *v.* Bromley, 7 Term Rep. 455; Benjamin *v.* Wilson, 6 L. C. Jur. 246; Smith *v.* Coe, 1 Sweeny, 385. Speaking of motions for an *alias* writ of possession, the supreme court of California at October term, 1872, says: "The doctrine of *res adjudicata*, in its strict sense, does not apply to such motions made in the course of practice, and the court may, upon a proper showing, allow a renewal of a motion of this kind once decided. But this leave will rarely be given upon the ground that the moving party can produce additional evidence in support of his motion, unless it also appears that a new state of facts has arisen since the former hearing, or that the then existing facts were not presented by reason of the surprise or excusable neglect of the moving party": Ford *v.* Doyle, 44 Cal. 635.

the party moving is taken by surprise, or if the motion be denied because of some defect in the moving papers, arising from ignorance of the practice. So a party may obtain leave to renew, on falsifying the affidavit used in opposition, or showing that the facts stated in it are explainable so as not to amount to a denial of the grounds of the motion. A motion will sometimes be opened on the question being changed by new materials discovered or arising afterwards."[1] The same degree of diligence will be required of a party in sustaining his motion as would be sufficient to free him from the imputation of laches, if he were engaged in the trial of the case. If he makes his application, and from his own neglect supports it by insufficient materials, and the rule is on that ground discharged, he cannot be afterwards allowed to supply the deficiency and renew the application.[2] Upon motions, as upon trials, public policy and courts of justice unite in requiring that there shall be an end to litigation. "And if a party will not be vigilant in prosecution or defense, and will suffer the time to go by for the production of his proofs without a sufficient excuse, he must not afterwards complain."[3] In England, it is a general rule, believed to be applicable to all the courts, that after an application has been made and has failed on account of defective materials, they will not allow any further inquiry. An exception exists when the affidavits have been wrongly entitled, or there has been some defect in the *jurat*. None of the cases, however, go to the extent of holding that under *no circumstances* can an application be made on fresh materials.[4] If a party fails in his motion on the ground of any formal defect in his papers, or from any cause not affecting the merits of his application, he should ask leave to renew the motion, or that it be denied with-

[1] Note to Dollfus *v.* Frosch, 5 Hill, 493; 40 Am. Dec. 368; Claggett *v.* Simes, 25 N. H. 402; Chichester *v.* Cande, 3 Cow. 89; 15 Am. Dec. 238; Greenwood *v.* Marvin, 111 N. Y. 423; Wings *v.* Hooper, 98 N. C. 428; Weller *v.* Hammer, 43 Minn. 195; Easton *v.* Pickersgill, 75 N. Y. 599.

[2] Regina *v.* Inhabitants of Barton, 9 Dowl. Pr. 1021.

[3] Ray *v.* Connor, 3 Edw. Ch. 478.

[4] Dodgson *v.* Scott, 2 Ex. 457.

out prejudice to another motion. If his request is granted, it should be so stated in the order. If his motion is denied generally, it is necessary to obtain leave to renew it, though it failed on account of some informality.[1] In Wisconsin, the denial of a motion to vacate a judgment is a bar to a writ of error *coram nobis*.[2]

The tendency of the recent adjudications is to inquire whether an issue or question has been in fact presented for decision and necessarily decided, and if so, to treat it as *res judicata*, though the decision is the determination of a motion or summary proceeding, and not of an independent action. This is especially true when the decision did not involve a mere question of the proper form or time of proceeding, but was the determination of a substantial matter of right, upon which the parties interested had a right to be heard upon issues of law or fact, or both, and these issues, or some of them, were necessarily decided by the court as the basis of the order which it finally entered granting or denying the relief sought.[3]

§ 327. **Proceedings Supplementary to Judgment.** — Proceedings taken for the purpose of obtaining possession of land by the aid of a writ of assistance, though upon due notice, and after a contest on the merits, are not, in a subsequent action, conclusive of any of the matters involved in the decision of the motion. Thus where, upon application of a purchaser under a decree of foreclosure, a writ issued, under which C was dispossessed of certain premises, and C afterwards, upon application to the court, procured an order restoring him to possession, on the ground that the land from which he had been removed was not included in that described in the deed, such order

[1] Dollfus *v.* Frosch, 5 Hill, 493; 40 Am. Dec. 368.

[2] Second Ward Bank *v.* Upman, 14 Wis. 596.

[3] Page *v.* Esty, 54 Me. 319; Reeves *v.* Plough, 46 Ind. 350; Trescott *v.* Lewis, 12 La. Ann. 197; State *v.* Booth, 68 Mo. 546; Wilson *v.* Commissioners, 30 Kan. 234; Hawk *v.* Evans, 76 Iowa, 593; 14 Am. St. Rep. 247; Johnson *v.* Latta, 84 Mo. 139; Obear *v.* Gray, 73 Ga. 455; Gordinier's Appeal, 89 Pa. St. 528; Warran *v.* Simon, 16 S. C. 362; Roulhac *v.* Brown, 87 N. C. 1; Mabry *v.* Henry, 83 N. C. 293.

being obtained after a full trial upon the merits of the issue involved in the application for restoration, it was decided that the question whether the deed did include the same premises was not *res judicata*, because the estoppel of a former adjudication can only arise "in a cause regularly tried on its merits upon issues duly joined by proper pleadings between the same parties or their privies," and because the motions and orders in the former cause, "although the parties to the second action appeared in and were interested in the result of such motions, were in no sense *judgments in an action* between these parties upon issues joined in a cause pending between them." [1]

Where money resulting from a sale of property is in court, and the application of a claimant is, upon motion in his behalf, heard, considered, and denied, his claim becomes *res judicata*, and he cannot maintain *assumpsit* for the same money.[2] Proceedings supplementary to execution under the code of California, requiring the judgment debtor to appear before a court or referee "to answer concerning his property, are but a substitute for a creditor's bill at common law. It is only a summary method of purging the debtor's conscience, and compelling the disclosure of any property he may have which is subject to execution. The proceeding was intended to be summary and effectual, and affords the widest scope for inquiry concerning the property and business affairs of the judgment debtor. It is true, there are no formal issues framed; for in the very nature of the proceedings it would generally be impossible to frame specific issues in advance of the examination of the judgment debtor. Nevertheless, witnesses may be called and examined on either side; and after hearing the case the court or referee is to decide what property, if any, the judgment debtor has which is subject to be applied to the satisfaction of

[1] Boggs *v.* Clark, 37 Cal. 236. For similar views, see Carter *v.* Clarke, 7 Rob. (N. Y.) 43.

[2] Langdon *v.* Raiford, 20 Ala. 532; Noble *v.* Cope, 50 Pa. St. 17.

the judgment, and to direct its application accordingly. The proceeding is purely judicial, involving an examination into the facts upon sworn testimony, and the decision of questions of law arising on the facts proved. The judgment creditor and debtor are parties to the proceeding, and each is at liberty to call and examine witnesses in respect to any contested fact which may be brought in issue in the course of the proceeding. If the parties to such a proceeding, as between themselves and privies, are not estopped from again litigating the same matters in another form of action, the whole proceeding would be but a judicial farce, accomplishing no useful end." It is too plain for argument that after an adjudication in such a proceeding, in reference to the liability of property to be applied to the satisfaction of the execution, the only remedy left either of the parties is by taking an appeal, and that while the adjudication remains in force both parties are estopped from litigating the same question in any other case or by any other form of proceeding.[1]

§ 327 a. **The Identity of the Defendant** may be so established by the judgment against him as to become *res judicata*. This is the case when he unsuccessfully defends an action on the ground that he is not the *person* intended to be named in a writing or judgment produced and sought to be asserted against him.[2]

§ 328. **Effect of Appeal.** — When an appeal is taken from a judgment, it is evident that the appellant cannot have the full benefit of his appeal if, during the time necessary to procure a decision in the appellate court, the judgment may be used against him to the same extent as if no appeal had been taken. The mere issuing and enforcement of the execution may be stayed by the giving of an appropriate bond, but there is no provision in the statutes whereby the force of a judgment as evidence or

[1] Verneuil *v.* Harper, 28 La. Ann. 893. [2] McCullough *v.* Clark, 41 Cal. 298.

as an estoppel may be avoided by the giving of any bond or other security. In perhaps a majority of the states the perfecting of an appeal suspends the operation of a judgment as an estoppel, and renders it no longer admissible as evidence in any controversy between the parties.[1] The chief objection to this line of decisions is, that it enables one against whom a judgment is entered to avoid its force for a considerable period of time merely by taking an appeal. During that time he may carry on other controversies with the same parties, involving the same issues, and obtain decisions contrary to that from which the appeal was taken, and which could not have been obtained had the former judgment been admissible as evidence against him; and when it is finally determined that such judgment was free from error, there may be no mode of retrieving the loss resulting from its suspension by the appeal. Probably this consideration has been the most potent in procuring the numerous decisions maintaining that the effect of an appeal, with proper bond to stay proceedings, is, merely that it suspends the right to execution, but leaves the judgment, until annulled or reversed, binding upon the parties as to every question directly decided.[2] The evil resulting from this rule is, that though the judgment is erroneous, and for that reason is reversed, yet before the reversal it may be used as evidence, and thereby lead to another judgment, which cannot in turn be reversed, because the action of the trial court in receiving and giving effect to the former judg-

[1] Souter *v.* Baymore, 7 Pa. St. 415; 47 Am. Dec. 518; State *v.* McIntire, 1 Jones, 1; 59 Am. Dec. 566; Woodbury *v.* Bowman, 13 Cal. 634; Haynes *v.* Ordway, 52 N. H. 284; Byrne *v.* Prather, 14 La. Ann. 653; Glenn *v.* Brush, 3 Col. 26; Sherman *v.* Dilley, 3 Nev. 21; Small *v.* Haskins, 26 Vt. 209; Sharon *v.* Hill, 26 Fed. Rep. 337; Green *v.* United States, 18 Ct. of Cl. 93; De Camp *v.* Miller, 44 N. J. L. 617; Atkins *v.* Wyman, 45 Me. 399; Ketchum *v.* Thatcher, 12 Mo. App. 185; Day *v.* De Yonge, 66 Mich. 550.

[2] Sage *v.* Harpending, 49 Barb. 166; Harris *v.* Hammond, 18 How. Pr. 123; Burton *v.* Burton, 28 Ind. 342; Nill *v.* Comparet, 16 Ind. 107; 79 Am. Dec. 407; Allen *v.* The Major, 9 Ga. 286; Planters' Bank *v.* Calvit, 3 Smedes & M. 143; 41 Am. Dec. 616; Parkhurst *v.* Berdell, 110 N. Y. 386; 6 Am. St. Rep. 384; Scheible *v.* Slagle, 89 Ind. 328; Rogers *v.* Hatch, 8 Nev. 35; Faber *v.* Hovey, 117 Mass. 108; 19 Am. Rep. 398; Thompson *v.* Griffin, 69 Tex. 139; Moore *v.* Williams, 132 Ill. 589.

ment was correct, and does not become erroneous when such judgment is subsequently reversed.[1] In Connecticut, the operation of an appeal depends upon the character of the jurisdiction of the appellate court. If the latter court has authority to try the cause *de novo*, and to settle the controversy by a judgment of its own, and to enforce such judgment by its own process, then it is plain that by the appeal the judgment of the inferior court is not merely suspended, it is vacated and set aside, and can no longer have effect as an estoppel. But if the appeal is in the nature of a writ of error, conferring power on the appellate court to determine such errors as may have occurred at the trial or in the decision of the cause, and giving the court, upon such determination, no other authority than that of reversing, modifying, or affirming the judgment of the inferior court and of remitting the case back to the tribunal whence it came, that such tribunal may conform its judgments and proceedings to the views of its superior, then the judgment appealed from does not, until vacated or reversed, cease to operate as a merger and a bar.[2] The effect of a judgment is not limited by the fact that on appeal it was affirmed on an equal division of the judges.[3] The mere pendency of a motion for a new trial neither destroys nor suspends the effect of a judgment;[4] but the granting of such motion vacates the judgment and the verdict or findings upon which it rested, and neither can any longer be respected as *res judicata*.[5]

§ 329. **After-acquired Rights.** — From the rule that an adjudication affects no claims which the parties had no opportunity to litigate, it results that no judgment or decree can prejudice rights which had not accrued to either

[1] Parkhurst *v.* Berdell, 110 N. Y. 386; 6 Am. St. Rep. 384.

[2] Bank of N. A. *v.* Wheeler, 28 Conn. 433; 73 Am. Dec. 683; Curtis *v.* Beardsley, 15 Conn. 518; Cain *v.* Williams, 16 Nev. 426.

[3] Lyon *v.* Ingham Circuit, 37 Mich. 377; Durant *v.* Essex Co., 7 Wall. 107.

[4] Young *v.* Brehi, 19 Nev. 379; 3 Am. St. Rep. 892.

[5] Edwards *v.* Edwards, 21 Ill. 121; Sheldon *v.* Van Vleck, 106 Ill. 45; Gulf etc. R. R. Co. *v.* James, 73 Tex. 12; 15 Am. St. Rep. 743; Winona *v.* Minnesota etc. Co., 27 Minn. 415.

of the parties at the time of its rendition. A decision that a right exists, or that a wrongful act has been committed, leaves the party at liberty to show at a future time that since the decision was pronounced the right has expired or the wrong has been abated.[1] Intervening events affecting the issue may be shown to prevent a former judgment from being conclusive, even where the title has been tried in a writ of entry.[2] While a judgment of a court on the application of a parent for the custody of a child is, in New York, *res judicata* as long as the circumstances continue the same, it ceases to be so whenever any change takes place in those circumstances.[3] Under no circumstances will a judgment or decree take effect upon rights not then existing.[4] If an action is brought to recover possession of real or personal property, the judgment therein cannot estop either of the parties from asserting title subsequently acquired.[5] If a decree is entered quieting title and enjoining the defendant from making any further contest against the plaintiff's title, this general language will be confined to rights in issue, and will not prevent the plaintiff from asserting a subsequently acquired title.[6] But a judgment is conclusive upon every right and title which the parties might have asserted, and does not become less final because the losing party afterward receives another and more formal evidence of title. If defendant has made proof and payment under the pre-emption laws before judgment against him, and afterward procures a patent, this is not a "new title" upon which he may make another contest. "It is merely a formal assurance of the estate which he had

[1] McKissick *v.* McKissick, 6 Humph. 75; Gluckauf *v.* Reed, 22 Cal. 468; Parker *v.* Standish, 3 Pick. 288; Dwyer *v.* Goran, 29 Iowa, 126; Neafie *v.* Neafie, 7 Johns. Ch. 1; 11 Am. Dec. 380; Mitchell *v.* French, 100 Ind. 334; Mound City L. A. *v.* Philip, 64 Cal. 493; Tarleton *v.* Johnson, 25 Ala. 300; 60 Am. Dec. 515.

[2] Perkins *v.* Parker, 10 Allen, 22; Morse *v.* Marshall, 97 Mass. 519.

[3] People *v.* Mercein, 3 Hill, 416; 38 Am. Dec. 644.

[4] Jones *v.* Petaluma, 36 Cal. 230.

[5] Hawley *v.* Simons, 102 Ill. 115; Barrows *v.* Kindred, 4 Wall. 399; Woodbridge *v.* Banning, 14 Ohio St. 328; Mann *v.* Rogers, 35 Cal. 316; Thrift *v.* Delaney, 69 Cal. 188; Brown *v.* Roberts, 24 N. H. 131; Merryman *v.* Bourne, 9 Wall. 592.

[6] Reed *v.* Calderwood, 32 Cal. 109.

already acquired by proof and payment."[1] The correctness of this decision is not free from doubt, and if it be accepted as correct, it must be restricted in its operation to those cases in which the non-issuance of the patent could not have constituted any impediment to the maintenance of the action or defense on the part of him to whom it subsequently issued. A claimant of a Mexican grant who has commenced proceedings for its confirmation, and against whom a judgment is recovered during their pendency, is, upon the final confirmation of the grant and the issuing to him of a patent in pursuance thereof, regarded as having acquired a title not in issue in the former action, and which may therefore be asserted notwithstanding the former judgment.[2]

The question has not yet been sufficiently discussed to enable one to foresee upon which side the weight of authorities will be finally ranged, as to whether a title may be regarded as an after-acquired one, when its acquisition, though after the commencement of the action, was prior to the rendition of the judgment therein. It is well settled that the issues in a case ordinarily refer to the beginning of the suit, and that matters occurring during its pendency are not in issue, and cannot be received in evidence, unless under some supplemental pleading filed by permission of the court. So far as the plaintiff is concerned, no doubt he is not estopped from asserting any title acquired after the commencement of the action, because he must generally recover upon the cause of action held by him at that time, and cannot be aided by rights of action arising afterwards. A defendant will, however, ordinarily be permitted by the court to plead that he has acquired a defense, or that plaintiff's cause of action has terminated *pendente lite;* and acting upon the rule that whatever may be presented as a defense to an action must be so presented, some of the courts have held that a title acquired

[1] Byers *v.* Neal, 43 Cal. 210. Merryman *v.* Bourne, 9 Wall.
[2] Amesti *v.* Castro, 49 Cal. 325; 592.

by a defendant after the commencement of an action must be asserted by supplemental pleading therein, and not being so asserted, is forever lost to him.[1] But, in our judgment, the defendant is under no obligation to enlarge the issues presented by the plaintiff's complaint, or in other words, to tender an issue respecting a matter which he claims to have occurred *pendente lite*, and if he does not plead title acquired after the commencement of the action, is not estopped from asserting it in any subsequent controversy, though it is with the party who prevailed in the former action.[2]

§ 330. **Defaults and Admissions.** — A judgment may result wholly or partly from the concessions of the parties; or in other words, from the fact that one of them has made allegations which the other has not denied, and which the court has therefore had no occasion to investigate. Hence the question arises whether the rules of *res judicata* apply to matters so conceded, or only to those upon which parties have taken issue, and which the court has on that account been compelled to decide. Upon principle, we think that the denial of a fact subsequently judicially established ought not to impart to an adjudication any greater effect than if all the parties had expressly or impliedly admitted the fact to be beyond controversy when such adjudication was made; and this is the view taken by the greater portion of the American courts.[3] The rule that a judgment is conclusive of every fact

[1] Reed *v.* Douglas, 74 Iowa, 244; 7 Am. St. Rep. 476.

[2] McLane *v.* Bovee, 35 Wis. 27; People's S. B. *v.* Hodgdon, 64 Cal. 95; People *v.* Holladay, 68 Cal. 439; Hemmingway *v.* Drew, 47 Mich. 554.

[3] Garrard *v.* Dollar, 4 Jones, 175; 67 Am. Dec. 271; Green *v.* Hamilton, 16 Md. 317; 77 Am. Dec. 295; Alabama G. S. R. R. Co. *v.* South etc. R. R. Co., 84 Ala. 570; 5 Am. St. Rep. 401; McCurdy *v.* Baughman, 43 Ohio St. 78; McCalley *v.* Wilburn, 77 Ala. 549; Ligon *v.* Troplett, 12 B. Mon. 283; Marks *v.* Sigler, 3 Ohio St. 358; McCreery *v.* Fuller, 63 Cal. 30; Nashville etc. R. R. Co. *v.* U. S., 113 U. S. 261; Brown *v.* Sprague, 5 Denio, 545; Greenwood *v.* New Orleans, 12 La. Ann. 426; Oregonian R'y Co. *v.* Oregon R'y & Nav. Co., 28 Fed. Rep. 505; Ebersole *v.* Lattimer, 65 Iowa, 164; Orr *v.* Mercer County Mut. Fire Ins. Co., 114 Pa. St. 387; Braddee *v.* Brownfield, 4 Watts, 474; Secrist *v.* Zimmerman, 55 Pa. St. 446; Goff *v.* Dabbs, 4 Baxt. 300; Twogood *v.* Pence, 22 Iowa, 543; Barton *v.* Anderson, 104 Ind. 578.

necessary to uphold it admits of no exceptions, and is equally applicable, whether the final adjudication resulted from the most tedious and stubborn litigation, or from a suit in which no obstacle was presented to defeat or delay plaintiff's recovery.[1] A judgment by default is "attended with the same legal consequences as if there had been a verdict for the plaintiff. There exists no solid distinction between a title confessed and one tried and determined."[2] A stipulation between the parties that a particular kind of judgment may be entered, while it ought to regulate the entry, has no subsequent effect. It does not alter the character of the judgment actually entered, even if the entry be different from that provided for in the stipulation.[3] In cases where no default is entered, the admissions made by either of the parties, whether in direct terms or by failure to traverse material allegations when called upon to do so, are as conclusive and as available as a bar as if they were proved by witnesses. An admission by way of a demurrer to a pleading is just as effective in favor of the opposite party as though made *ore tenus* before a jury.[4] If the tenant, in a writ of entry, pleads non-tenure, and the plea is admitted by the plaintiff, it operates as an estoppel of record in the same manner and to the same extent as if found by a jury.[5] Also, if the defendant interposes a good plea in bar, to which plaintiff makes no reply, and the court on that account orders

[1] Judgment by default or consent is binding as *res judicata:* Ellis *v.* Mills, 28 Tex. 584; Fletcher *v.* Holmes, 25 Ind. 458; Dunn *v.* Pipes, 20 La. Ann. 276; Derby *v.* Jacques, 1 Cliff. 425; Newton *v.* Hook, 48 N. Y. 676; Brown *v.* Mayor, 66 N. Y. 385; Jarvis *v.* Driggs, 69 N. Y. 143; Doyle *v.* Hallam, 21 Minn. 515; Van Valkenburgh *v.* Milwaukee, 43 Wis. 574; Blair *v.* Bartlett, 75 N. Y. 150; 31 Am. Rep. 455. In the case last cited the court emphasizes the fact that while the former judgment was by default, yet the court was, notwithstanding such default, required to take testimony and to have proof of all the allegations essential to plaintiff's recovery. Wadhams *v.* Gay, 73 Ill. 415, shows an inclination on the part of the courts of that state to follow the English decisions, and to deny that *res judicata* can arise except when a court after argument and consideration comes to the decision of a contested matter.

[2] Bradford *v.* Bradford, 5 Conn. 127; Gates *v.* Preston, 41 N. Y. 113; Green *v.* Hamilton, 16 Md. 317; 77 Am. Dec. 295; note 270 to Phillipps on Evidence; Gates *v.* Preston, 3 L. T. Rep. 221.

[3] Semple *v.* Wright, 32 Cal. 659.

[4] Bouchaud *v.* Dias, 3 Denio, 243.

[5] Hotchkiss *v.* Hunt, 56 Me. 252.

judgment to be entered that the case be dismissed, such judgment, though informal, is good as a plea in bar.[1] What is here said with reference to the effect as *res judicata* of a judgment entered by consent or upon default must be considered in connection with the limitations expressed and the authorities heretofore cited,[2] showing that where the subject-matter of the two actions are different, nothing is *res judicata* which was not in fact presented to the court and determined in the former action.[3] Irrespective of its effect as *res judicata*, a judgment by consent is regarded as in the nature of a contract or binding obligation between the parties thereto, which neither, in the absence of fraud or mistake, has the right to set aside or disregard, and which as against each is a waiver of errors and irregularities;[4] and when such consent judgment embraces matters or extends to relief not involved within nor responsive to the issues in the case, it, with respect to such matters and relief, no doubt partakes more of the character of a voluntary agreement between the parties than of a judgment of the court determining a controversy between real litigants.[5]

§ 331. **English Cases.** — The decisions in England are, no doubt, somewhat at variance with those in this country in regard to the effect of declining to traverse a material issue tendered by the opposite party. The tendency there is to confine the estoppel to matters disputed.[6] "A party is estopped from saying that any issue was improperly decided, but he is not estopped in a future action by an admission on the record. He is not to be estopped by any matter not in dispute, and upon which the jury never gave

[1] Campbell *v.* Mayhugh, 15 B. Mon. 145.

[2] See sec. 253.

[3] Adams *v.* Adams, 25 Minn. 72; Colwell *v.* Bleadley, 1 Abb. App. 400.

[4] Jones *v.* Webb, 8 S. C. 202; Mannion *v.* Fahy, 11 W. Va. 482; Collins *v.* Rose, 59 Ind. 33; Allen *v.* Richardson, 9 Rich. Eq. 53; French *v.* Shotwell, 5 Johns. Ch. 564; Atkinson *v.* Manks, 1 Cow. 709; Bradish *v.* Gee, Amb. 229.

[5] Vermont etc. R. R. Co. *v.* Vermont etc. R. R. Co., 50 Vt. 500. Consent judgments do not bind third persons: Carroll *v.* Hamilton, 30 La. Ann. 520.

[6] Jenkins *v.* Roberton, L. R. 1 H. L. S. 177. See also Goucher *v.* Clayton, 11 Jur., N. S., 107.

judgment."[1] A lessee was sued upon a lease, and made an ineffectual defense. Afterward, being sued for subsequently accruing rent under the same lease, he answered that, prior to the former action, the lease had been annulled by an agreement between the parties substituting another and different lease in its stead. This defense was not suggested in the prior suit, though as available in that as in the second. The former judgment was decided to be no bar to this defense. The grounds of this decision were, that a default or an admission by neglect to traverse in an action upon any contract admits nothing but the execution of the contract, and leaves the defendant at liberty to show, in a future action, any defense arising under the contract since its execution, and that "nobody ever heard of a defendant being precluded from setting up a defense in a second action because he did not avail himself of the opportunity of setting it up in the first action." We submit, however, that this position is clearly untenable. The judgment in the first action, being for rent upon a lease, could only be supported by a valid lease existing in full force until and including the latest period of time for which rent was allowed. The judgment for defendant in the second action could only be upheld, under the issues made in that action, on the ground that the lease was inoperative during the time for which rent was recovered on it in the first action. It is impossible that the second judgment was not in utter disregard of the first, when the facts necessary to uphold the one are irreconcilable with the facts necessary to uphold the other.

§ 331 a. **Disclaimer.** — The defendant in a real action or an action to recover possession of or to determine conflicting claims to real property may, instead of permitting judgment to be entered against him by default, file a disclaimer. Such disclaimer does not operate as a convey-

[1] Carter *v.* James, 2 Dowl. & L. 236. See, *contra*, Boileau *v.* Rutlin, 2 Ex. 665, 681.

ance from him to the plaintiff so as to transfer his title to the latter and to enable him thereupon to recover of another defendant upon the title of the defendant who has disclaimed.[1] At the common law, no judgment whatever could be entered after the tenant had disclaimed. Under the present practice, if the defendant did not at the commencement of the action claim any interest in the property, nor hold possession of any part thereof, he is generally entitled to judgment for his costs, while, on the other hand, if he did in fact make such adverse claim, or withhold from plaintiff any part of the property, the plaintiff is entitled to judgment for the relief prayed for in his complaint and costs. But whether the action is terminated by the disclaimer, or results in a judgment in favor of the defendant for his costs, founded upon his having filed such disclaimer, the defendant is estopped from asserting title to any part of the land held by him at the commencement of the action in which he disclaimed.[2] This result appears to follow the filing of the disclaimer and to exist anterior to the entry of judgment. Hence where the defendant disclaimed as to part of the land sued for and defended as to the residue, and in making his defense proved that the conveyance of the whole tract to plaintiff was forged, it was held that the plaintiff was entitled to judgment and to a writ of possession against defendant for the land disclaimed.[3]

§ 332. **Last Judgment Prevails.** — Rights acquired by virtue of a judgment or decree are liable to be terminated in the same manner. Thus if two Mexican grants are so confirmed at different dates that the same land is included in both decrees, and the confirmee of the first grant, being a party to the second confirmation, fails to assert the former decree in his favor as a bar, his rights will be

[1] Currier *v.* Esty, 116 Mass. 577; Oakham *v.* Hall, 112 Mass. 535.
[2] Hamilton *v.* Elliott, 4 N. H. 182; Prescott *v.* Hutchinson, 13 Mass. 439; Wooters *v.* Hall, 67 Tex. 513; Jordan *v.* Stevens, 55 Mo. 361; Dodge *v.* Richardson, 70 Tex. 209.
[3] Dodge *v.* Richardson, 70 Tex. 209.

divested by the second decree.[1] So where A foreclosed a mortgage, making B a party to the suit as a subsequent encumbrancer, and obtained a decree against B as such, and B afterwards foreclosed *his* mortgage, making A a party as a subsequent encumbrancer, and also obtained a decree, it was decided that if A wished to avail himself of *his* decree, he should have set it up in the second action, and that, not having done so, his rights under it were lost.[2] Upon the same principle, it has been held that one released from his debts by the operation of a discharge in bankruptcy cannot urge such discharge against a judgment entered in an action in which the discharge might have been presented as a defense.[3]

The principle that as between two conflicting adjudications the last must control must be limited to cases in which the court had authority to pronounce it. Where, for instance, the state and national courts have concurrent jurisdiction of a controversy, and the latter are resorted to first, they have the right to continue to exercise their jurisdiction to final judgment, and such judgment when recovered is probably paramount to any judgment subsequently recovered in a state court determining the same controversy.[4]

§ 333. **Reversal.** — The reversal of a judgment is a complete extinguishment of the estoppel. It may still have effect as a muniment of title in favor of a purchaser under it; but this benefit does not extend to any collateral fact found by the verdict or judgment.[5] A judgment vacated or set aside is no longer a bar,[6] and if a decree of divorce is annulled, the marital rights, obligations, and *status* of the parties are revived, although one of them has in the mean time married and borne children of the last marriage.[7]

[1] Semple *v.* Wright, 32 Cal. 659; Semple *v.* Ware, 42 Cal. 619.
[2] Cooley *v.* Brayton, 16 Iowa, 10.
[3] Rahm *v.* Minis, 40 Cal. 421; Marsh *v.* Mandeville, 28 Miss. 122.
[4] Sharon *v.* Sharon, 84 Cal. 424.
[5] Wood *v.* Jackson, 8 Wend. 9; 22 Am. Dec. 603.
[6] Taylor *v.* Smith, 4 Ga. 133.
[7] Comstock *v.* Adams, 12 Chic. L. N. 359.